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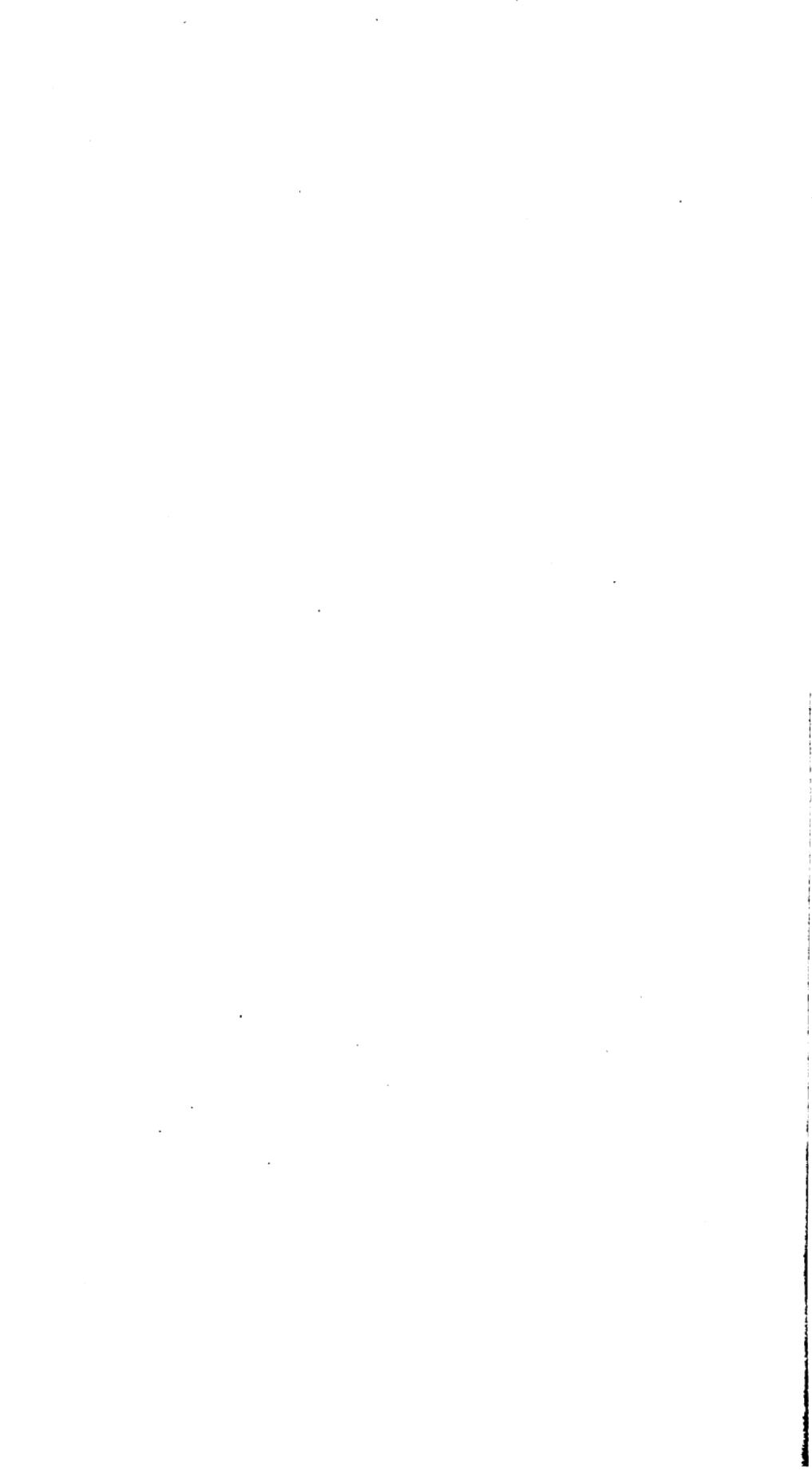


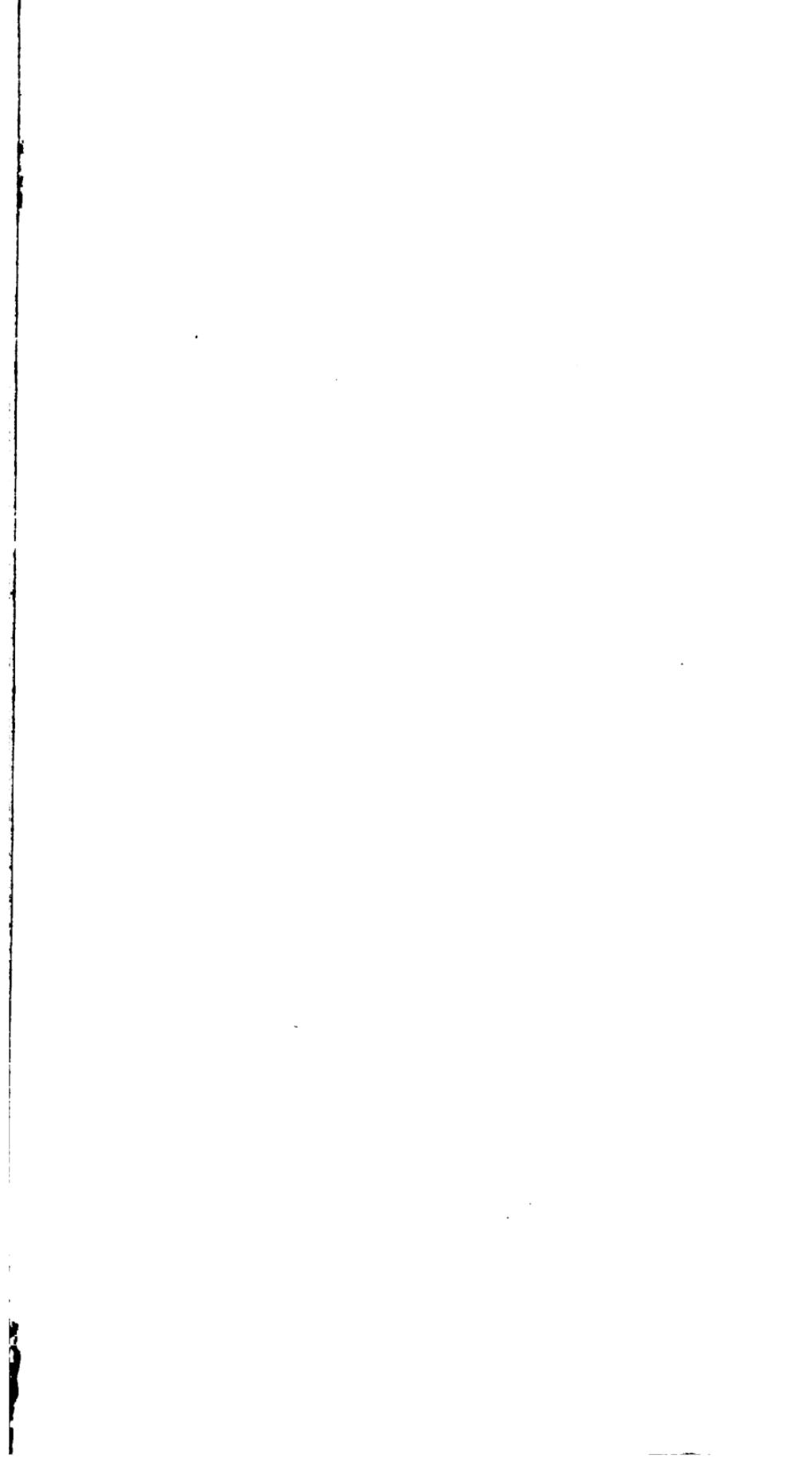
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**OBSERVATIONS**  
**ON THE**  
**PHILOSOPHY**  
**OF**  
**CRIMINAL JURISPRUDENCE,**  
**BEING**  
**An Investigation of the Principles**  
**NECESSARY TO BE KEPT IN VIEW**  
**DURING THE REVISION**  
**OF THE**  
**PENAL CODE,**  
**WITH REMARKS**  
**ON**  
**PENITENTIARY PRISONS.**

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BY J. E. BICHENO,  
OF THE MIDDLE TEMPLE, ESQ. F. L. S.

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London.

PRINTED FOR R. HUNTER, 72, ST. PAUL'S CHURCH-YARD; J. HATCHARD,  
190, PICCADILLY; WILLIAM PHILLIPS, GEORGE-YARD,  
LOMBARD-STREET; AND JOHN AND ARTHUR ARCH,  
CORNHILL.

1819.

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NO. VIII  
AMERICAN

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J. MORRIS, PRINTER, NEWBURY.

## Preface.

A Publication on the subject of Crimes and Punishments needs no apology at the present moment. The question is one of deep interest, involving in it the present and future happiness of thousands, and the property of all. I have endeavoured to avoid the beaten tract, not because I would undervalue the truths which my predecessors have established, but because I should only have to repeat them, without adding to their strength or to their attraction. This circumstance will make my performance appear very imperfect to one who is only beginning to consider the subject; but had I attempted to render it complete, it could not have appeared until much of the interest now excited would have subsided; and I am willing to forego the credit of a systematic treatise for the advantage of being useful at the present juncture. Besides, the occasion has created readers; and it is very possible that

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an obscure author on Criminal Jurisprudence might lie very quietly on the shelf, if he were to withhold his production until it was perfected to his wishes,

Those who are in the habit of treating political occurrences as nothing more than temporary irregularities to be provided for by the sagacity of the statesman, will, perhaps, regard my method of handling the subject as nothing more than spurious and abstruse speculation; and I cannot forbear the temptation, even at the threshold, to disarm these reasoners, by premising, that I have the happiness to follow in the steps of Lord Kaimes, whose History of the Criminal Law, in his Tracts, is founded on the same principles which I have adopted; and that those principles are most amply unfolded and established by that eminent theologian and moralist Bishop Butler, in his Sermons and his “Analogy.” But by preferring the train of argument here employed, I hope I shall not be thought to esteem the practical observations

of the writers by whom I am preceded less than they do themselves; but almost every author has very cursorily passed over the abstract part of the question, and has rested almost entirely on its practical consequences; and practice alone will never enable us to determine a political truth.

The outline of my argument is briefly this. We must endeavour to discover the general laws by which the affairs of mankind are naturally regulated without any interference on the part of human legislatures; and must make ourselves acquainted with the orderly succession of events, to which all things, both in the physical and moral world, have a tendency, and the means which nature has adopted to rectify the discrepancies which are incidental to this constitution of things. Having established this first point, I endeavour to point out where we must discover those general laws which are connected with Criminal Jurisprudence. The instinctive dispositions and inalienable rights of our

nature, which are intended to protect us from aggression, afford us the clue ; and, in taking these as our guide, I contend that we fall in with the practical tendency of law as well as with the abstract reason of it ; and that we are not lost in the remote and vague speculation to which those who treat the law as purely conventional are obliged to resort. The *end* proposed by penal jurisprudence I have stated, as others have done, to be the prevention of crimes ; but a broad distinction is drawn between crimes when treated abstractedly or as offences against the Deity, and crimes treated as injuries done to the members of society. It is in the latter view alone that the municipal law has to do with them. I then proceed to examine the qualities and properties of offences by which we are best enabled to proportion punishment or penalties to them ; and this most intricate part of our discussion brings us to this conclusion, which I can regard only as an approximation to truth, that the least exceptionable criterion is the moral character of

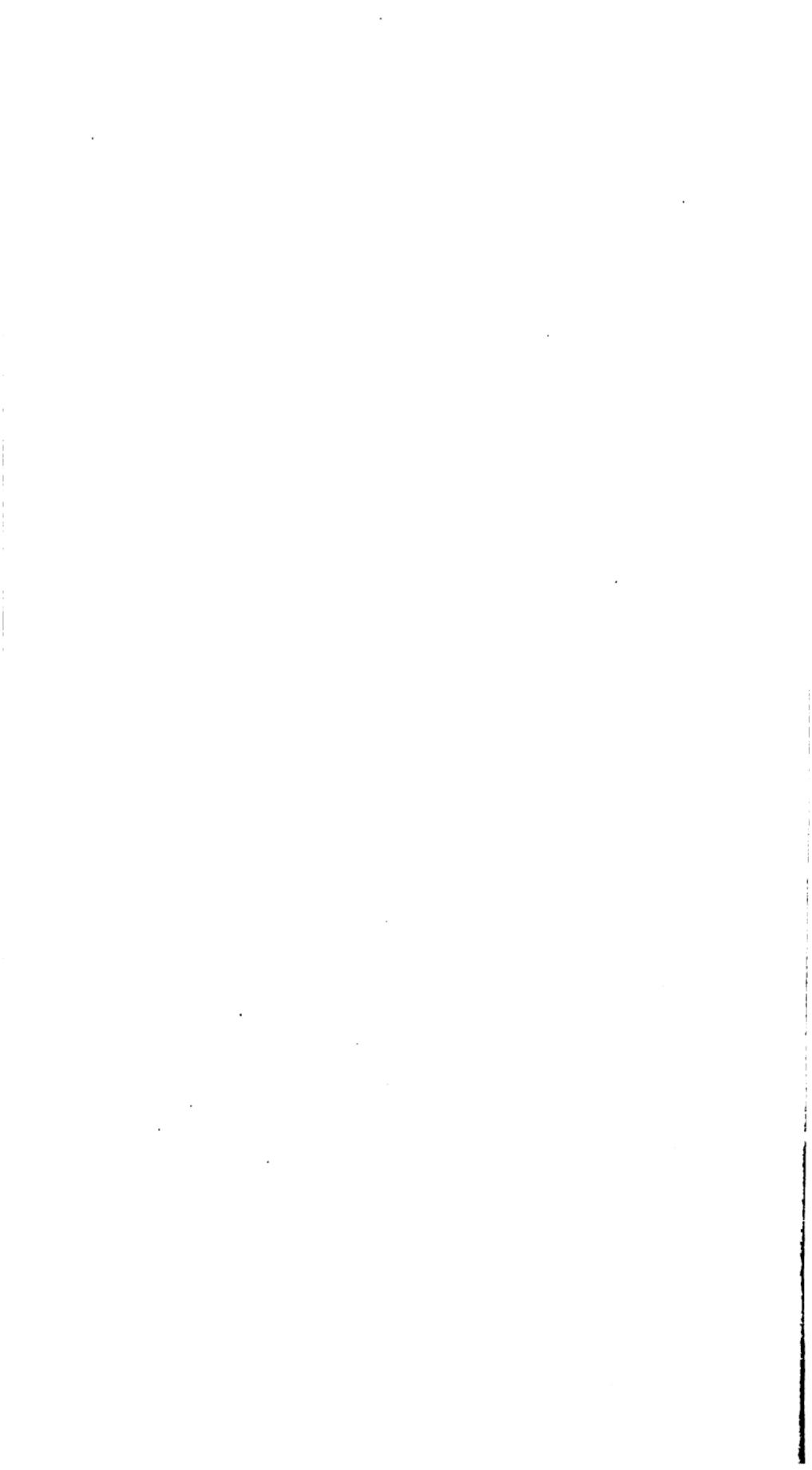
the action to be punished. Nevertheless by adopting this as our guide, care must be taken, that punishment be not dealt out retributively, or with relation to injury and crime in the abstract; and that the intimidation of the wicked be not the primary object. What is added by way of example must be employed incidentally and not to encrease the measure of corporeal suffering. The example must arise out of the *manner* of executing the sentence; and not, as is too frequently the case, out of the subject-matter. For the sake of perspicuity I regret that I have not repeated this distinction at p. 147, 219, and 253. Having determined that the first object of the law is to restrain the criminal, and then to reform him and deter others, I proceed to examine the modes of punishment best adapted to answer these desirable ends, and am led to give the preference to imprisonment, with its various modifications, for all offences short of the most flagrant. The infliction of death I determine can be justified only on account of

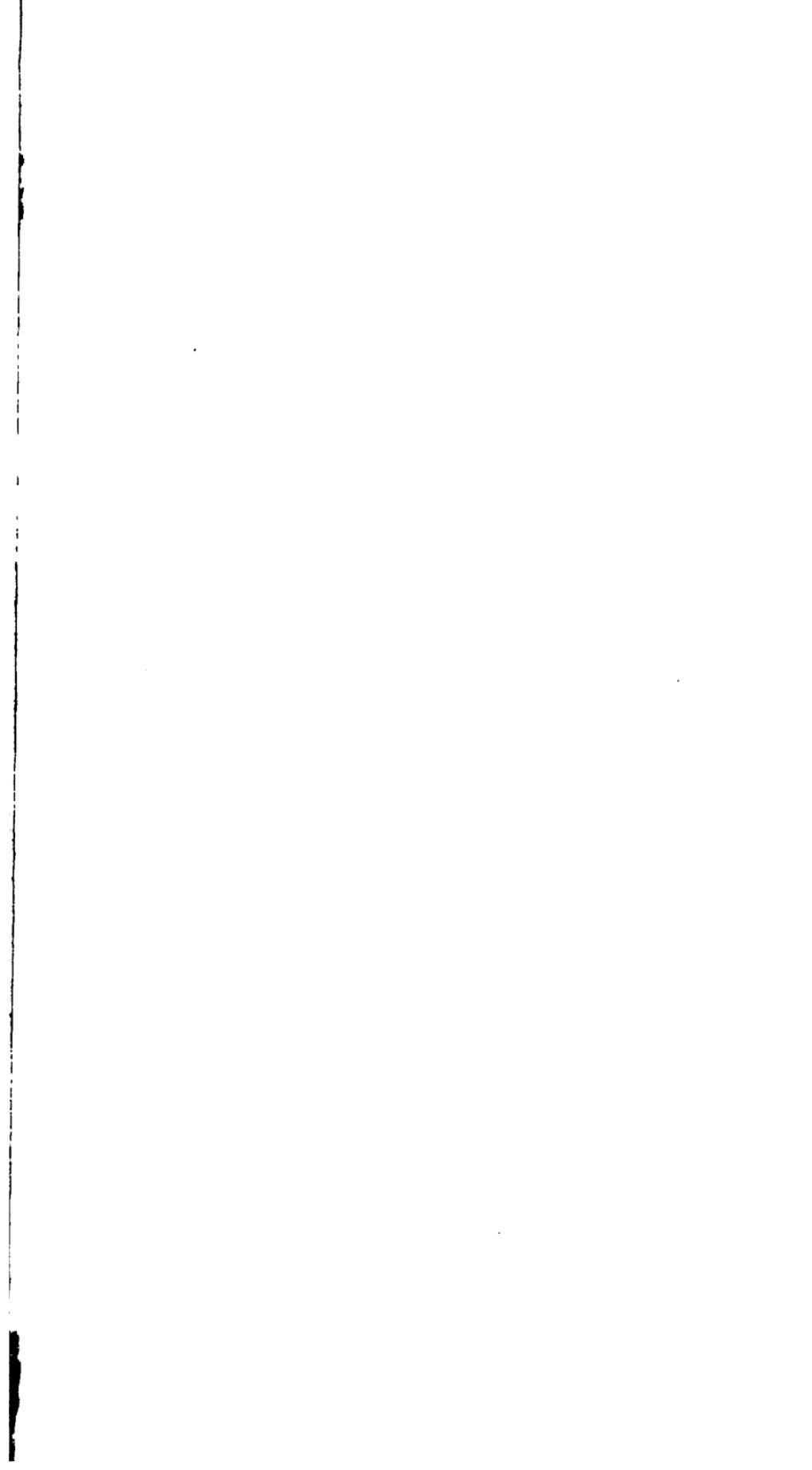
those aggravated crimes which dissever the elements of a healthful society; and is to be regarded not altogether as a punishment, but as the only means of defence against a certain description of miscreants.

My next object is to shew the distinction between human and divine law, and how the former must be made to correspond with the latter. This leads me on to discuss the point how far written law is capable of being made an instrument to regulate the disorders of society; and though this is a question of infinite difficulty, I hope it is treated in such a way as to deserve the attention of politicians. The reader however, who expects to arrive at definitive conclusions on these intricate subjects will be disappointed. They admit of no new discoveries; and at present we must probably rest contented with elucidating their difficulties, and drawing a more definite line, than has hitherto existed, about the means we employ and the ends we aim at.

The last chapter contains some remarks on prisons and prison discipline; and the more I consider these parts of the subject the less I anticipate from any additional assistance to be derived from statute law. If the public are not interested in the fate of prisoners, no law can supply the place of such a defect. Society by its virtues, not by its power, must supply the philanthropists who shall superintend Gaols and correct their maladies. The law can only sanction the principles which shall direct them; it cannot devise the plans of reformation or infuse the principles themselves.

Those who are in the habit of considering these subjects will be most disposed to pardon the deficiencies of a work, which has been written, *calamo currente*, for a particular occasion. However satisfactory and coherent an author may regard his opinions while they remain floating in his mind, the transferring of them to a substantial and condensed vehicle by the art of printing enables him





## ERRATA.

Page 18. *l. 21. dele* as intuitive axioms.  
42. *l. 26. for* Disoper *read* Disposer.  
43. *l. 4. after* beings *insert* to beings.  
115. *l. 4. for* its *read* their.  
147. *l. 26. before* punishment *insert* excessive.  
153. *l. 18. for* ruler *read* rule.  
183. *l. 21. dele* sumptuary.  
195. *l. antepenult, insert a hyphen between* criminal-reformis :  
203. *l. 8. dele* period *after* Adsit.  
209. *l. 6. for* terrors *read* terms.  
238. *l. ult. after* with *insert* these.  
253. *l. 4. before* punishment *insert* excessive.

## APPENDIX.

III. *l. antepenult for* Green *read* Grew.  
*l. 5. insert reference, Lord Kaine's Historical Law Tracts,*  
*p. 3-8.*

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THE  
PHILOSOPHY  
OF  
**CRIMINAL JURISPRUDENCE.**

**CHAPTER I.**

*Of the state of the public feeling relating to the subject;—the prospects the discussion presents, and the difficulties to be apprehended.*

IT is an opinion which has had the sanction of ages, that every nation has necessarily its period of improvement and decline; and, in looking back on human affairs, it must be confessed, that the retrospect is unfavourable to another conclusion, and almost excludes the hope of witnessing any material renovation in the institutions of mankind. It would seem as if national glory was permitted to arrive at a splendid crisis only to kindle its funeral pile; and that truth has to commence her laborious ascent afresh, after having transiently exhibited herself to a few passing generations.

But it is happy for mankind that they are more ready to be elated by hope than dejected by fear ; or, perhaps, the alarming encrease of penal convictions ; the viciousness of the lower orders ; and more especially, the growing depravity of our youth, would excite such a despondency in this island, as might hasten the catastrophe, which we are hoping to avoid. As nothing is so sure a protection against shipwreck as a knowledge of the seas we are traversing, so nothing will contribute more to save us from the danger of any political evil, than a thorough investigation of every subject bearing upon it. If it be true that old legislatures are naturally opposed to innovation, it is equally true that the people, at a certain stage of information, are precipitately fond of it. It is therefore of the utmost importance that the public should be put in possession of every new view, in which a subject is capable of being placed : and thus, by being made acquainted with the difficulties and the encouragements, they may give themselves up, neither to hopelessness on one side, nor to rash encounters on the other.

The national voice has been lately raised against the construction and administration

of the penal law, and the subject is thus forced upon the most sluggish attention. This has not arisen from the increased severity of the executive power, the clemency of which has notoriously been more prevalent than in former days, but from the increase of crime, after all the exertions which have been made to prevent it. Besides this, we live at that turn of improvement, where mankind are apt to think lightly of old doctrines for no better reason than because they have not accomplished all that was expected; and thinking, as a traveller does, that the only way to recover the lost path is to tread back his steps, they are desirous of beginning their career afresh with new institutions. Be it observed, however, that moral and political truth will not admit of such a retrogression. We cannot here retrace our steps; for we must take men as we find them, made up as they are of habits and customs, and endeavour to accommodate to their new opinions the institutions already established. We must engraft upon the old stock, and not attempt to plant a new one.

Such a state of public opinion, though it brings many inconveniences which are to be lamented, is, I trust, a presage of improve-

ment; and an evidence that moral science is only following upon the heels of physical science, and will, under wise management be conducted to the same solid and satisfactory ends. The one throws light upon the other; and the more they are studied together, the more they seem consecutive and dependent. Thus every new principle that is discovered in Art or Science becomes the centre of a concentric series; or rather, as I have seen the relation of subjects in Natural History illustrated, our items of knowledge are held together like the meshes of a net, in no very regular order; but still connected on all sides, and capable of being extended to an indefinite length and breadth. To pursue these varying series by inductive reasoning, and to resolve them into general truths, is the legitimate end of moral and political speculation; and in no one thing does the ascendency of the moderns over their ancestors appear more conspicuous.

From these considerations, I am disposed to look upon the interest that is taken at present in the question of Crimes and Punishments, as likely to result in beneficial consequences; and that it is not forced upon our consideration more by the state of our prisons,

than by the preparation which the public mind has undergone to enable it to discuss such subjects—subjects, which have hitherto been buried under a heap of controversial and scholastic rubbish,—and which, until the last century, it would have been thought wild and presumptuous to enter upon. In support of this opinion I need only refer to the success of the writers on Political Economy within the last fifty years; to the disposition in the superior judicial courts, however much overruled by precedent, to be guided more than ever by the broad principles of moral right; and to the philosophical treatment, which many subjects of law have received from the most eminent persons in the profession. The legislature has also adopted the same enlightened views on some questions; as a proof of which, I need only refer to some of the Reports of the late House of Commons, and especially to those adopted on the Poor Laws, which are as full of sound and solid reasoning as is anywhere to be found on the subject. The Reporters have climbed up to the *vantage ground of science*, as my Lord Bacon calls it, instead of grovelling below in search of philosophers' stones, and empirical schemes of social happiness. Lord Bolingbroke remarked in the middle of

the last century, before Political Economy had scarcely dawned, that whenever this should happen, the study of the law would deserve to be ranked among the learned professions; and one of the *vantage grounds* to which men would climb would be metaphysical, (evidently not in the sense of the schools) and the other historical knowledge. "They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws: and they must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all their effects, good and bad, that they produced."

It cannot however be too seriously impressed upon those who are sanguine in their expectations, how little political and religious institutions of long standing, are capable of being amended by sudden alterations. The abstract justice is more easily to be determined than that which is practical; and, if the one class of reasoners is wrong, which imagines political knowledge to be ripened by experience alone, and that it ad-

mits of no improvement from the light thrown upon the other sciences, and by a wise and prudent speculation; the other, which is opposed to it, labours under as great an error, when it magnifies exclusively the merit of new discoveries, and puts its chief confidence in theoretical acquirements. The latter forgets that human systems, though they oftentimes interrupt the natural course of improvement to which society has a tendency, do not in general put an entire stop to it; and that much which is defective in our law, when regarded abstractedly, is corrected in a practical application. The profound remark which Hume has made, that "all political power is dependent upon the public opinion," may be extended to the whole of the institutions of Society,—that they conform, as far as their nature will admit, to what the public would have them to be. We are disposed probably to take our own opinion for that of the majority, because we wish it to be so; and then to compare the established systems with this limited standard, instead of trying them by the sentiments of the public at large. Such conduct is no doubt a fruitful source of mischief. Besides, our habits and opinions are in a great measure made to conform to the prevail-

ing systems; and though they should be the prejudices merely of our education, yet as many of them are established by influences not within our control, we are not always to be blamed for possessing them, and at any rate they are to be treated with tenderness and respect.

Those who expect any good from hasty changes of the municipal law, or who mean to adopt as the motto on their banner "overturn," "overturn," will discover when it is too late, that politics, as they involve so deeply the happiness of society, and produce such incalculable and unforeseen consequences, do not admit of this experimental enterprize. They contain too many detonating and fulminating ingredients to be entrusted to the manipulation of the inexperienced projector. The utmost sagacity will scarcely serve to guide us through common political difficulties; and can we then wonder that the sober part of mankind, most of whom are formed by ordinary and practical pursuits, should fear the want of a pilot, "when," as Mr. Burke expressed himself with a different application, "the high roads are broken up, and the waters are out,

when a new and troubled scene is opened, and the file affords no precedent."

I will give them credit, moreover, of believing they foresee, that, if they embark upon the billows by which they are encompassed, there is no safe port to which they can steer, no rock where they can rest; and though they feel the shore on which they are standing to be washing from beneath their feet, they prefer the alternative of perishing where they have been nurtured, rather than of venturing they know not whither.

But though I am disposed to concede thus much to those who may differ from me on a rational conviction, I will not extend this concession to those persons, who may be discovered in every class of society, high and low, whose opinions all grow out of their habits of life, instead of their habits growing out of their opinions. They are so extremely ductile in their constitution, that they conform to any established mould, however distorted; and, like clay, which is equally passive in the hands of the potter, whether it be modelled into a vase, or a tea cup, so they are any thing or nothing as chance and accident may direct. They

have no identity to preserve, but what is common to the whole lump of humanity.

The subject before us, however, as it does not interfere with the immediate interests of such persons, will I trust not be prejudged by them without examination. It is one of vital importance to society; and though it is likely to be precipitately determined on by the sanguine, this circumstance does not warrant us in rejecting it as unfit to be dispassionately examined. Strange indeed would it be, if this science of governing the depraved were the only one that can make no progress; and while other knowledge has been enlarging its circles by daily additions, this alone should remain confined to the narrow circumference that restricted it in the darkest ages of our history, and the most degraded state of the human intellect. Many old doctrines, which agitated the political hemisphere in past centuries, are silently gone over; and, though the sky be not cloudless, we have more light than ever to examine into these questions, so interesting and so important to our well-being.

That political speculations should be abused, is only to remark what must inevitably

await every discovery bearing so closely upon human happiness. This objection against discussion really amounts to little more than saying, that all men are not endowed with an equal share of prudence. There will always be a large portion of shortsighted reasoners, who, from this very defect, will see the strongest all the objects within the compass of their vision ; and, guided, as the majority of such persons usually are, unduly by their feelings, they will be ready to start for a promising point in the distance without regarding the obstacles in the road. Disappointment and chagrin usually follow from such adventures ; and if political experiments could be tried with as little injury as chemical ones, such failures would be profitable,

But unfortunately for these projectors, the institutions of mankind have most of them grown out of the urgency of occasions, and have accommodated themselves practically to our varying opinions ; by which means we become in a measure reconciled to them, though their leading principles may be founded in error. Thus the Americans, with all their love of liberty, and of equality among mankind, have never yet got rid

of negro slavery, which is absolute in some of the states, and exists practically in all. That they are sincere in wishing to rid themselves of this "broadest, foulest blot," cannot be doubted; but the difficulties arise from the habits of the people, which in this instance completely neutralize the spirit of their speculative constitution. That this reconciliation to our circumstances is natural, I cannot doubt, though I lament over the abuses to which it is exposed; but, if our transatlantic brethren, who have started with completely new social institutions, are not able to rid themselves of the inconveniences arising from established notions, some fears may justly be apprehended lest we, who have still more ancient attachments, should be found meddling with institutions before their nature is thoroughly understood, and the people are prepared for the introduction of better systems.

We are arrived at the point, from which the evils of old establishments are seen in all their magnitude; but it is no despondency to doubt whether, for many of our civil grievances, the remedy is yet discovered; or, if discovered, whether the public is sufficiently enlightened to admit of its applica-

tion. They who would sweep away, for instance, our present criminal code, which after all has less practical evil in it than it has speculative, and would put in its place some other artificial system of the like nature, would only introduce more mischief into society. They would break up an Institution, which by an inherent tendency in artificial law, has accommodated itself as far as it can to what is right ; and would put in its place another, with most of its defects as to principle; and none of its correctives as to practice.

Happily, the present question has been brought before the public by no political party so as to raise the opposition, or infuriate the zeal, of the respective partisans ; but it has been introduced, and supported, chiefly by those whose philanthropic character ensures them a favourable reception ; and who will always command the countenance and the sympathy of the wise and good throughout the country. Indeed it is a curious fact well deserving the attention of philosophers, that *they* are generally preceded in their schemes of beneficence by a class of persons, whose labours and opinions they do not sufficiently estimate, but, who adopt

a principle higher than reason, emanating from the pure dictates of a well regulated heart: and thus, they illustrate that remark of Lord Shaftesbury, who will not be suspected of fanaticism, that "*True wisdom comes more from the heart than from the head.*"

The question, as must easily be perceived, borders on some of the most tender and disputable ground occupied by politicians and moralists; and though it stands at present unconnected with any party, it will require the utmost discretion on the side of the friends of improvement to hold it free of this pollution. Its contact with the extreme of either side would at once communicate a contagion, that would terminate in the defeat of the useful purpose for which the discussion is entertained. The author thinks he is quite aware how much candid attention is required fairly to review the difficulties of the subject; and is apt to suspect his own speculations on it, knowing how many contingencies there are to be provided against, and how frequently latent biasses, too remote perhaps to be detected, contribute to the formation of our opinions. To the public therefore he appeals as a test to try their sterling value. Nor is it to be disregarded, that in judging

of the affairs of mankind, we as frequently discover a deficiency of mental discipline and self-knowledge by rejecting opinions because they are antiquated, as by adhering to them for the same pertinacious reason. I am ready to confess myself exposed to such fallibility, in common with the rest of my species; and, as Sir Richard Steele is said to have published his "Christian Hero" in order to commit himself to his dissolute companions as an admirer of virtue; so would I, as an expedient against the infirmities above alluded to, declare to the reader thus early, that in maintaining my opinions, I shall endeavour not to betray the weakness of the controversialist; and, as is too frequent, be more solicitous for my own theories than for the triumph of Truth.

farther before them than they have been accustomed to do. If they would succeed they must be able to anticipate what men *will be*, as well as what they *have been*; and instead of depending upon minute regulations, which take their character from the season in which they are adopted, they must proceed upon broader principles, and enlarge their rules to the utmost limits, so as to have regard to the spirit of men's actions, and not to the technical definition of them.

The necessity of adopting this line of conduct has given rise to a new Science in modern times, which has been applied with unexampled success to some particular branches of government. It adopts as its leading principles truths like these; which, instead of being visionary and metaphysical speculations, come home to the bosom and understanding of every man as intuitive axioms: "That what we call the Political Order, is much less the effect of human contrivance than is commonly imagined:—That every man is a better judge of his own interest than any legislator can be for him; and that this regard to private interest (or, in other words this desire of bettering our condition) may be safely trusted to as a principle of ac-

tion universal among men in its operation ;--- a principle stronger indeed in some than in others, but constant in its habitual influence upon all :---That, when the rights of individuals are completely protected by the magistrate, there is a strong tendency in human affairs, arising from what we are apt to consider as the selfish passions of our nature, to a progressive and rapid improvement in the state of society :---That this tendency to improvement in human affairs is often so very powerful, as to correct the inconveniences threatened by the errors of the statesman :--- And that, therefore, the reasonable presumption is in favour of every measure which is calculated to afford to its farther development, a scope still freer than what it at present enjoys ; or, which amounts very nearly to the same thing, in favour of as great a liberty in the employment of industry, of capital, and of talents, as is consistent with the security of property, and of the other rights of our fellow citizens."

These characteristical doctrines of the Political Economists, quoted from Dugald Stewart as the best source of authority, though they have no direct bearing upon the subject of penal legislation, evidently lead to

it. For why should we stop at those principles of our nature by which labour and its productions are regulated ? and why not comprehend all such as govern mankind in the pursuit of their well-being ? Surely if the *acquisition* of property, and the wealth of nations, be regulated by unerring principles among mankind, unassisted by the arm of power, the *protection* of it has not been left to accidents and chances ; and jurisprudence, affecting the latter, will be as wisely established by taking for its guide those laws of our nature adapted to protect us from injury, as it will, in the former instance, by adopting those, which regulate labour and its productions. It must be confessed that as yet the writers on Political Economy have not adverted to such a source of information in a systematic way ; and the question of Crimes and Punishments has been agitated to little other purpose than to show how wide we are of any rational foundation on which to place it. The benevolent feelings, which have brought it forward before the public, will in a measure prevent us from coming to those calm and unprejudiced conclusions which are the object of philosophic inquiry ; and yet I know not that any political question could be introduced by better harbingers.

Premising this, we will proceed with our argument. I apprehend, then, that the most important distinctions which are made among political reasoners, and which affect the question of Crimes and Punishments, are comprehended in these two descriptions.

1. Those who regard the social order as resulting from the sagacity and contrivance of Statesmen; and not from any natural tendency there is in society to rectify its own discrepancies, and advance its own interests.

2. And the others, who contend that the social order is indebted for its success to certain natural laws, which are to be discovered by the study and observation of mankind in their different relations towards each other, and which human laws cannot contravene without introducing perplexity and disorder.

As the difficulties of the question under our review, and the utility of examining them, depends entirely upon the determination we come to upon these points, it will be necessary to discuss them rather minutely.\*

\* I have gone more into this question, because some philosophers think it to be a principle of the human mind to assume the

The first class contend, that men in a state of nature are not social; and antecedent to the formation of civil society are subject to certain laws and possess certain rights, which are relinquished when they enter into this union. And this language they employ, not merely to express what is happening every hour, that we give up a less benefit in order to possess ourselves of a greater; but to convey the idea, that in our social capacity, we are not under the guidance of any natural law; but, in order to supply its place, we resign ourselves to another law of human invention, which they regard as better adapted to provide for human exigencies. Thus they look upon the social polity as of artificial construction, and not under the government of any intelligible and fixed principles. They imagine it to depend for its success and happiness on the experience we have already had of the institutions of mankind; and consequently of great importance, that Statesmen should not wander from the old beaten track. In their view it is chimerical to draw any practical inferences from theory, how-

stability in the order of nature without any reasoning. See particularly *Stewart's Philosophy of the Human Mind*, Vol. II. chap. 2. sect. 4.

ever well conducted; and they treat the soberest speculation on the subject, in much the same manner as a carpenter would treat a mathematician, who should endeavour to demonstrate to him the principles of his art. Hence, they insist that they support Experience in opposition to Theory. They are great friends to precedents and ancient authorities, because every scheme of legislation appears to them illusory, which has not actually been tried. The subject is to them so involved and intricate, containing such innumerable particulars and so few general rules, that they cannot perceive any order and arrangement in the condition of nations, or any general rules by which they are governed; or, if there be any, the exceptions to them are so numerous, that, with our limited views, they cannot be employed to any good purpose.

To these views, which I have endeavoured to state without prejudice, numerous, and I think weighty, objections may be opposed.

The more attentively we examine the material world, the more will the inquisitive mind be impressed with the power, the wisdom, and the order that pervade it. Whe-

ther we contemplate the planetary motions, or confine our studies to the revolutions of our own orb, and watch its successive changes from night to day, and winter to summer, we must come to the conclusion that it is governed by fixed and determinate laws. If we descend in the scale of creation and examine the laws of matter, it is impossible to suppose they are not directed by the same immutable wisdom. Descend again: take a flower or a blade of grass. Mark its structure, its arrangement, its beauty, its uses; go farther, take a microscope and see its capillary vessels, its spiral tubes, its cells, all in infinite variety in the various species, but all governed by some fixed laws, and directed towards some definite end. And yet the laws by which the vegetable world is ruled are not without exception. Though they are full of intelligence, it is not every plant that fulfils the end of creating all plants. Many are destroyed by accident, many die by disease, and others, just as their purpose seems to be answered, are cut down to be appropriated to another use. These occurrences we are apt to regard as discrepancies in the vegetable world, because we do not see their design and end; and yet, had we the eye of a larger intelligence, we should no doubt

perceive that they were only a part of the great scheme of omniscience, and were as much within his view at the time of creation as the proximate issue itself.\*

The animal world again is equally under the guidance of an unerring law. The powers of the various species, their instincts, their habits, their succession, fill us with wonder and astonishment; and no one ever yet contended that as individuals they were thus the objects of our admiration; and yet as gregarious beings they were the sport of accident, and directed by no common principles, which were beneficial to the whole body.

It will scarcely be disputed, I should apprehend, that there are some principles implanted in man, which are subject to the same, or similar, comprehensive laws as those governing the inferior animals. Such for instance are our appetites; the more violent passions; the pleasures and pains derived from our senses of tasting, smelling, hearing, seeing, and so on. All these are subject to some control, and directed by some unseen influence, which we cannot resist

\* See Note (A) Appendix.

without uneasiness to ourselves; and the conclusion at which all practical persons arrive, is, that there must be some common cause operating upon us to produce this consentaneous end.

We speak of this order of nature, by analogy, as if it were a *law*. Not that we mean to insinuate, that the Deity governs his creation by verbal rules which he lays down for himself or his creatures; but it is a brief and convenient way of speaking of that constant order of succession in physical and moral events, whether good or evil, so conspicuously established in the world. So when we speak of the more comprehensive laws of our nature, such for instance, as that happiness arises from the proper exercise of our powers; we must include all the consequences of this state of being, evil as well as good: and when we allude to the general laws of the universe, we mean to include all the consequences, which were within the view of the Deity at the creation. As laws are rules of *action*, the word *principle* seems to be employed by us to express, abstractedly, the highest sources of intelligence to which the human understanding can ascend.

But it is not the stronger lineaments of our nature alone that discover order and arrangement. All the passions and affections and propensities may be traced to some common principles, which it is impossible not to conceive have a connexion with the consequences flowing from them. The study of these has engaged the wisest men in every age ; and it would be truly ridiculous to suppose, that all this while they have been traversing a wilderness in pursuit of phantoms, or following a path for the absurd purpose of discovering it ended in an inextricable labyrinth. The difficulties of the study occur just where we should expect them ; in the state of human affairs, which are under the control of a moral government.

Still it must be confessed, great progress has been made in our acquaintance with the motives of action in men, and with their moral constitution ; and frequently it has happened, that what appeared faulty in it, has been found to be wise and good. Further advances have opened larger views ; new light has appeared ; objections have been answered ; and every step has contributed to shew the order that prevails from the beginning to the end ; from the attributes of

the highest rational existence to the meanest animal, that is the sport of the winds and waves. This should encourage us to proceed, as well as teach us diffidence with regard to whatever we may still be unable to account for.

If the constitution of man considered individually is so clearly established upon fixed and unerring principles, and he is not the child of chance and accident, acting without motive and without end, we may safely proceed a step farther, and insist, that as a social being he is under the guidance of the same intelligent laws. The greater part of his passions and affections have their source in this connexion ; and these are so interwoven with those which belong to him as a solitary being, that, though the attempt has been frequently made by the most acute philosophers, no one has yet been able to draw the line to determine when the one class begins and the other ends. This attempt has even given rise to systems of the Passions and of Morals, which have failed chiefly from the impossibility of separating the two parts of our nature.

It is not only the affections which are exci-

ted in the most intimate connections, such as the conjugal, the parental, and those arising from the various degrees of consanguinity, but all the benevolent and malevolent qualities of our nature are necessarily called forth, and sustained, by certain corporeal and intellectual relations, that exist with the animated creation, and especially with that part of it which partakes of our own nature.

The social relation calls into exercise the greater number of human virtues. All philanthropic actions spring from this source; and it is hard to conceive that these are not within the scheme of Providence. Besides the virtues, no excellence could be obtained in any branch of art or science without the assistance and incentives that this union affords. All improvement in society, from the barbarous hordes of America to the polished nations of Europe, may be traced to the conflicting interests, which are created by the gregarious disposition of mankind. It is the struggle for bread between one man and another, which awakens and preserves industry: it is the emulation inspired by more liberal pursuits, which creates excellence. All these provocatives to virtue and

science would be wanting, if man were by nature an unsocial animal.

Again, if society be left to a fortuitous government, and no wise and benevolent end is to be answered by it (for it is contradictory to conceive that accidents and chances have an assignable end,) there will be no motive for action, or for the exercise of any social virtue. For we are induced to act as rational creatures by foreseeing the use and end of our actions; and this supposes that causes and effects are constant in their dependence: but if these dependences do not exist; or, which is the same thing, are suspended by human power, no man will act because no man can predicate the issue. His intention is as likely to be brought about by some lucky coincidence as it is by his applying the utmost sagacity and deliberation. This part of the subject is treated by Dr. Thomas Balguy with his usual acuteness, and I will request the readers attention to a passage in addition to what I have said. "The happiness of man depends on the exercise of his faculties: that is, on the right application of his active powers, under the direction of his understanding. But the understanding can give *no* direction for our

conduct, unless we can judge of the effects and consequences of actions proposed to our deliberation: and we only judge of these (we have no other *possible* way of judging) from the effects of *like* actions in times past. If then similar effects do not constantly flow from similar causes, we shall have *no* rule of conduct at all.—Experience of the past is our only guide for the future. We have no other way of knowing that food will nourish, or that arsenic will poison us. We have no other way of discerning any connexion between the seed we put into the ground, and the harvest we expect to reap. It is thus we learn that labour must prepare the soil; that sun and rain will cherish the rising plant, and bring it at length to maturity and perfection. Were not like causes to produce like effects, we could form no judgment at all of future events; and therefore our understanding could never regulate our conduct.”\*

From these considerations it will also follow, that as men owe their success to any other cause than their own intelligence, that intelligence is of less importance in regulating and directing their conduct. How

\* See his *Divine Benevolence Asserted*.

strongly this is opposed to systems of human origin, contrived for the purpose of managing mankind, will be presently seen.

It must be added, that if the world be generally governed by established laws, and any part of it be excepted out of this extended dominion, that part, being the subject of accident and chance, could not exist while it was surrounded and intrenched upon by a system, which was under the direction of wise and appropriate designs. Suppose for an instant a race of beings to exist, who had no laws to control them, but that caprice and whimsicalness were the sole ingredients of their life ; and that other animals directed by a wise administration were their neighbours ; can we find any difficulty in determining that the former race would very soon be exterminated from the face of the earth ? To suppose man living without any system of natural law to govern him in his social capacity, is a simular case ; and if it were really thus, the brutes by which he is surrounded, which oftentimes invade his province, and with which he has frequently to contend for food and power, would in the end, if governed by wise and settled laws, gain the ascendancy over him, and drive him to seek

another home. It is essentially the nature of order and design to get the better of disorder, and every thing proceeding from accident. This of itself is sufficient to satisfy us which in the end will become the supreme.

Indeed we may carry this idea still further, and insist, that, as confusion and accident could not exist in any system in conjunction with, or in opposition to, established order, so it is incredible that the Author of this system should have suffered confusion and accident to be the final consequences of any thing he has created. It has been contended, that politicians for want of attending to these truths have been too ready to employ human contrivances to set right what they conceived to be disorders in society. They have relied too much on their own limited foresight, instead of studying the scheme of moral government as exhibited in themselves and in those around them ; and have been content with the acquisition of particulars, without extending their views to general truths. Thus their machine is constantly deranged, and requires the perpetual interference of the supreme power to rectify it, instead of its having a tendency to greater

simplicity, and a corresponding easy management. To this cause chiefly is to be attributed the lamentable and pitiable state of the poor; the impracticability of the commercial law; and what is more to the point, the increase of punishments, and the impossibility of continuing a penal code, which had its origin in an age of absolute power, and when morals were but a weak and feeble restraint upon the manners of the people.

Besides the arguments to be deduced from what may be observed of the frame and constitution of the material world, and of human nature, there are some others, arising from the perfections of the Deity, which have not been much adverted to by political writers; but which carry us much farther into the subject, and inspire us with confidence in the dark and mysterious paths of inexperience, where we most need such a guide.

The satisfaction we receive in contemplating the order of the world around us, serves principally to direct us in circumstances corresponding to our experience; but the consideration, that all the occurrences in nature, seen and unseen, present and fu-

ture, are directed by perfectly wise and unerring laws; and that what we cannot comprehend is as much under the control of infinite rectitude as the most familiar events, is a fountain of knowledge absolutely perfect, and is limited only by the measure of intelligence which we bring to it.

To suppose the Deity to be unconcerned even about the minutest creature is to impugn his perfections. What he has condescended to create, he condescends to care for; and his goodness is a pledge to us of the end at which he aims. As far as this attribute is confined to generals, or to any class of particulars, and does not extend itself to every event, however inconsiderable, and every individual, it is imperfect, and therefore cannot belong to a perfect Being. When we exclude the Deity from watching over trifles, as beneath his dignity, or that it is a trouble to Him to direct the affairs of mankind, we bring his perfections to be tried at a human tribunal, and impute to him human imperfections. The same eternal benevolence which engaged him to create rational beings, and gave them instincts and qualities suitable to a social union, and made that union to produce much of their happiness,

has not left it to accidental contingencies, even in the minutest affairs ; and the evil to which it is exposed, from the crimes of the vicious, was not uncontemplated by Him, and therefore is not unprovided for.

If we can satisfy ourselves of these truths, we shall have made an immense step towards the eminence after which we are striving. Our study of crimes and punishments, which has hitherto been without rudder and without compass, will be directed in some known tract ; and we shall not be left to form our conclusions upon a few isolated facts ; but we shall be enabled to reason *a priori* with more certainty than the largest experience, or the most voluminous accumulation of particulars, could possibly give. If it should be objected to this mode of reasoning that it is a vicious circle, determining the cause by the effect, and then the effect by the cause, I may perhaps be permitted to reply to such objectors, that it is a method we admit on a thousand other occasions. A series of familiar particulars enables us to establish a general truth, the sterling value of which depends upon the correctness and sagacity of the reasoner. From that truth we may logically deduce other

particulars unconnected with those before observed, and I apprehend these deductions to be quite satisfactory. Indeed, it is the only mode of proceeding in morals, as long as we are not in possession of the highest principles on which they rest.

The most serious objections that can be urged against adopting these speculations, appear to be 1. That no society, with which we have any acquaintance, ever took them as their guide to the extent here proposed. 2. And that human laws, and more especially the criminal laws, are established for the purpose of rectifying those evils in society, which seem to form the exceptions to the established order which may be observed in it.

The novelty of any political speculation is always an argument against it ; but in this case it is not so new as is commonly apprehended. It is certain that no government has yet been established, or could possibly exist, which has not taken for the ground work of its legislation some of the moral laws, and some principles of human action ; and that the European governments have laid a broader foundation on this rock, than

any which have preceded them. The law of nations is, confessedly, intended to rest entirely upon it; and what is the common law of the land derived from, but from the maxims and received opinions of the times in which it originated, and which were thought to be established on justice? Our courts of equity, again, were invented to avert the rigour of the law in particular cases, which would have been unjustly dealt with, if the written statutes and established forms had been adhered to; and though their decisions are not always correct, and they have sometimes proceeded upon narrow views, yet it must be recollected that, for the time, they were regarded as established upon the best opinions; and that it is study and observation, which have enabled us to discover these imperfections. As is the case with the progress of all moral truth, the less principle has been resolved into another more comprehensive. The question then is shifted to, "what is the degree in which the system ought to prevail?"

If those who rely on human schemes to provide against political difficulties will allow some laws to exist, of the description alluded to, and which have been fortunate enough to

be established at a remote period, what good reason can be assigned why others should not be added to this valuable code ? Is there any thing that should put a stop to their extension in the present century ? or, can it be imagined, that our forefathers at once fathomed the abyss of this profound subject, and have left us nothing to perform ? In Astronomy, in Mechanics, in Chemistry, in Ethics, in Metaphysics, they have bequeathed to us a boundless field. In these studies each succeeding age has surpassed the foregoing ; mediocrity in the present century has outstripped the genius of the last ; and yet the genius of this still finds himself at an immeasurable distance from those intellectual possessions, which stretch beyond his sight, and which some succeeding Locke or Newton shall more successfully explore.

It is a strong fact also bearing upon the question, and worthy to be repeated, that all human institutions, as far as their nature will admit, conform----in spite of opposition----to the public opinion, in proportion to the strength and durability with which these opinions are expressed. Hence the practical changes, in the administration of law and other established systems, bring about that

radical renovation, which legislatures have not confidence or power to attempt ; and it will be found that these quiet, yet irresistible innovations are constantly at work ; and that, generally speaking, they are the only safe ones that are carried into effect. The unanimous expression of the public voice is become a more powerful agent than the sword ; and, as the intellectual character of society improves, it will be every day more absolute, and more incumbent on the statesman to anticipate it. The reader's observation will not fail to call to his mind many illustrations of these truths so important to social happiness ; and, among the rest, to the gradual change which has taken place in the administration of the criminal law. As more rational opinions have prevailed, it has assumed among us a milder and more merciful character, and both Judges and Juries have submitted to the practice of "pious frauds," as Mr. Justice Blackstone called them, rather than become the executioners of so sanguinary a code. Indeed, we are at last come to the point where the practice of our Courts of Law is, in these cases, entirely at variance with the Statutes which ought to control them.

From these considerations I am led to the conclusion, that the doctrines insisted on are not new; that, with all the opposition to them from the prevailing systems, they are silently operating to the advantage of society; and no objection can reasonably be urged, why they should not be avowedly the chief guide to conduct us in the establishment of all our social institutions.

The second objection which I took, "that human laws, and more especially the criminal laws, are established for the purpose of rectifying those evils in society, which seem to form the exceptions to established order," must be answered, by appealing to the experience we have of the perfect intelligence to be discovered in those events with which we are acquainted. How, it will be urged, can human foresight take any better guide in judging of the exceptions to the general order around us, than that which we obtain from our own scanty experience? How can any general truth assist us in determining particulars, which the limited faculties of man cannot satisfactorily perceive to arise out of them? To these queries the following answers have suggested themselves to my mind.

We have seen by the previous discussion, that no part of the animate or inanimate creation, and especially the moral constitution of man, can be the subject of accident; but that all must be governed, even the minutest affairs, by constant and unerring laws. Should this be true, our power of doing ill, and the existence of ill itself, is the result of a wise and good constitution of nature. It is not possible indeed, if our happiness is made to depend upon our actions, and those actions are the subject of choice and preference, to conceive of any other system which could have been adapted to produce the end proposed. *Why* evil is permitted to exist in the world has escaped the lynx-eyed sagacity of theologians and philosophers ever since the reasoning powers were employed, and is not a question to be discussed here; but that, being permitted, it has a rational end and purpose to answer, and is produced by some incitements and motives which are proper objects of research, is no more to be doubted of than the wisdom and benevolence of the supreme Disposer of events. Thus far we may be completely satisfied, that "A world, in which nothing depended upon ourselves, however it might have suited some imaginary race of beings, would never have

suited mankind ; or, rather, would have transformed them into other creatures ; from intelligent and active beings, immersed in sense, and incapable of all higher gratifications."\*

The irregularities which appear in society, arising from the commission of crimes and from the weakness and wickedness of some of its members, cannot be traced to any other source than that which gives rise to all other moral evil. It is not an evil *sui generis*, as some politicians would regard it, that must be treated and subdued in a manner different from all other evil. The human mind is its seat, and this we find acted upon in a certain way by motives and habits, which produce a succession of phenomena sufficiently constant and uniform to make them the subject of scientific research. The difficulties attending this study are of course greater than that of matter. The characters of men being so infinitely varied, the springs of action so remotely seated, and the circumstances in which they are placed being so extremely unlike, must necessarily make the investigation of whatever relates to mind and morals an arduous employment ; yet I think it will

\* Balguy on Divine Benevolence, p. 99.

be admitted on all sides, that the philosophy of the human mind, especially in later years, has emerged from its oblivion, and has made as great accessions to its stores, as any science that can be named ; for what is *Political Economy*, taken in its largest sense, but this science applied to a peculiar relation in which mankind are placed ?

In proportion as we extend our views, human affairs exhibit, more and more, a systematic and orderly arrangement ; the circumstances, which we have been accustomed to regard in the light of exceptions, are found to be necessary and consistant parts of the whole scheme ; and we are every day securing additional points to enable us to lay down this intellectual chart for the guidance of future legislators. The heavens themselves are but a wilderness of stars to the inexperienced eye ; and surely the study of the human mind, with our present acquisitions, is not in a more hopeless condition than the science of Astronomy must have been a few centuries ago. Much as we have to learn therefore, we have every encouragement to urge us forward ; and we may rest quite assured, that the evils of which we complain, and many of which appear so

unaccountable, will not, after a time, be subjects of vague and doubtful conjecture; but the vicious actions of men will be more clearly traced to their springs, and legislators will be enabled to establish measures, not so constantly liable to be defeated as they have hitherto been; but founded on incontrovertible and general truths, which carry within them their own vindication.

It is a mistaken opinion to suppose, that the study of the phenomena of human nature, taken as the ground work of legislation, proceeds only on speculative principles, and is therefore unfit for the use of the practical politician. The fact is, that the philosopher comes to his conclusions assisted by the largest experience; for while the statesman is viewing mankind through the medium of a particular purpose which he has to answer, and is gauging national character by the help of statistical tables--the other surveys men of every age, and color, and condition, under all their varied circumstances; and draws instruction, at the fountain of history, and biography, and the experience of others; and lastly, retires within his own bosom, where he finds the surest test by which to try the correctness of his results. It is not enough that

he should *know men* in the common acceptation of the phrase; for this branch of knowledge is circumscribed within narrow limits, and does not attempt to discover the primary motives of human actions; but the philosophic legislator must be acquainted with the remote as well as the proximate causes of men's acting; and he will think nothing beneath his notice, which will throw any light on the natural history of his species. Until the rulers of the world will adopt this course, there is not much prospect that society will be greatly benefitted by their labours. They have too long treated the evil propensities of men as matters not subject to any rational laws, and therefore to be subdued by force; instead of examining them as the most curious questions of the highest science within the scope of the human faculties. If we would do good on a large scale, we must not attempt to drive men into goodness, or even to attack vice in the fastnesses of habit and prejudice; but we must ascend up to the source of the mischief, and having discovered the principles from which it arises, we must endeavour to cut off the tributary springs, that we may have a sound and healthful soil fit for the virtues to flourish in.

No book has been more deservedly extolled than the "Inquiry into the Nature and Causes of the Wealth of Nations," the leading object of which is to apply the general laws, which regulate the course of human affairs, to the subject of labour and its various productions. It will hardly be objected to its doctrines, that they are theoretical assumptions and metaphysical speculations; but on the contrary, they are founded on the most practical observations on men and things, which carry conviction to every understanding.

The subject of crimes and punishments admits of being treated in the same way; and though at present it seems surrounded by inextricable difficulties, these arise more from the deep-seated nature of the principles which are to be examined, than from their being unfit for examination. Indeed it is just what might be expected in the progress of Political Economy, that the moral branch of the science will be the last to be understood.

That the reader may not imagine the subject is deficient in practical results, I will call his attention to some remarks of Mr.

Stewart, selected from a variety of others relating to human affairs, which are scattered up and down through his works.

“ In politics,” says this elegant writer, “ as well as in many of the other sciences, the loudest advocates for experience are the least entitled to appeal to its authority in favour of their dogmas ; and that the charge of a presumptuous confidence in human wisdom and foresight, which they are perpetually urging against political philosophers, may, with far greater justice be retorted on themselves. An additional illustration of this is presented by the strikingly contrasted effects of *statistical* and of *philosophical* studies on the intellectual habits in general ;—the former invariably encouraging a predilection for restraints and checks, and all the other technical combinations of an antiquated and scholastic policy ;—the latter, by inspiring, on the one hand, a distrust of the human powers, when they attempt to embrace in detail, interests at once so complicated and so momentous ; and, on the other, a religious attention to the designs of Nature, as displayed in the general laws which regulate her economy ;—leading, no less irresistibly, to a gradual and progressive

simplification of the political mechanism. It is, indeed, the never failing result of all sound philosophy to humble, more and more, the pride of science before that Wisdom which is infinite and divine;—whereas, the further back we carry our researches into those ages, the institutions of which have been credulously regarded as monuments of the superiority of unsophisticated good sense, over the false refinements of modern arrogance, we are the more struck with the numberless insults offered to the most obvious suggestions of nature and of reason. We may remark this, not only in the moral depravity of rude tribes, but in the universal disposition which they discover to disfigure and distort the bodies of their infants; in one case, new-modelling the form of the eyelids;—in a second, lengthening the ears;—in a third, checking the growth of the feet; in a fourth, by mechanical pressures applied to the head, attacking the seat of thought and intelligence. To allow the human form to attain, in perfection, its fair proportions, is one of the latest improvements of civilized society; and the case is perfectly analogous in those sciences, which have for their object to assist nature in the cure of diseases; in the developement and improve-

ment of the intellectual faculties ; in the correction of bad morals ; and in the regulations of *political economy*.\*

It may be useful to put some remarks of Mr. Hume in conjunction with those just quoted ; and they are the more remarkable, as he wrote before the Economists had established their doctrines, and therefore will be the less suspected of being biassed by the opinions of a political sect.

" All people of *shallow* thought," says he, " are apt to decry even those of solid understanding, as abstruse thinkers, and metaphysicians, and refiners ; and never will allow any thing to be just, which is beyond their own weak conceptions. There are some cases, I own, where an extraordinary refinement affords a strong presumption of falsehood, and where no reasoning is to be trusted but what is natural and easy. When a man deliberates concerning his conduct in any *particular* affair, and forms schemes in politics, trade, œconomy, or any business in life, he ought never to draw his arguments too fine, or connect too long a chain of consequences to-

\* *Philosophy of the Human Mind*, Vol. II. c. 4. sect. 5.

gether. Something is sure to happen, that will disconcert his reasoning, and produce an event different from what he expected. But when we reason upon *general* subjects, one may justly affirm, that our speculations can scarcely ever be too fine, provided they be just; and that the difference between a common man and a man of genius, is chiefly seen in the shallowness or depth of the principles upon which they proceed.—It is certain, that general principles, however intricate they may seem, must always, if they are just and sound, prevail in the general course of things, though they may fail in particular cases; and it is the chief business of philosophers to regard the general course of things. I may add, that it is also the chief business of politicians; especially in the domestic government of the state, where the public good, which is, or ought to be, their object, depends on the concurrence of a multitude of causes, not, as in foreign politics, on accidents and chances, and the caprices of a few persons. This therefore makes the difference between *particular* deliberations and *general* reasonings, and renders subtlety and refinement much more suitable to the latter than to the former.”\*

\* Moral and Political Essays—Of Commerce.

His fourth Essay, *That Politics may be reduced to a Science*, is written to prove that the subject admits of general truths, which are invariable by the humour or education either of subject or sovereign; and in another, *Of the rise and progress of the Arts and Sciences*, he has introduced an inquiry to the same purpose. His arguments on the original contract, between the sovereign and the people, have a similar bearing, besides many incidental hints, which are to be gathered from various other parts of his works.

If the views I have taken in the foregoing pages of the political institutions of mankind be correct, the discouraging opinions of some persons with regard to the improvement of the condition of society, need not alarm us. The past state of the world cannot be adduced as conclusive in respect to the future. A gradual progress in knowledge has been made from the beginning, and this has been accelerated in modern times by the art of printing to such a degree, that, added to the right, or rather the better, application of the faculties, which may be also placed among the discoveries of the present age, the advancement of human reason is infallibly secured against every accident, and, con-

sequently, the means of human happiness as inseparably connected with it.

The science of criminal legislation having had to contend with the most inveterate passions and depravity of the species, has been among the last to be benefited; and it is within a very short period that any serious attention has been directed to the subject;—scarcely any writers, but of the present generation, having ventured to call in question the practice of our ancestors, who considered this department of the law as even more dependent upon the sagacity of the politician than any other, and defective only for want of a stronger arm of authority, and not at all suspecting the first principles of the system to be deficient.

Even Montesquieu, following some ancient authors, says, that on account of the influence of climate, it is with great hazard that one nation can adopt the laws of another. But it is upon trivial notions such as these that the code of every nation has been framed, trusting more to minute regulations than to general principles; and attempting to remedy every defect by a more severe and rigid administration of law, instead of

## CHAPTER III.

*Of the constitution of human nature as it relates to the protection and defence of individuals ;—of animal resentment ;—of rational resentment ;—of punishment ;—of the right to destroy life as a means of defence ;—of Gisborne's conclusions.*

IF I have succeeded in carrying the reader along with me in the previous arguments, he will find the next step one of easy transition; and he has, perhaps, already anticipated me in many of the observations I shall have to make on the principles of human actions. However, seeing that almost every author of reputation has felt the difficulties attending this subject, and has been so little satisfied with the system of his predecessors, that every one has had a system of his own, I cannot enter upon this chapter without expressing my fears of producing disappointment instead of conviction: but,

as I shall endeavour to confine my remarks to these more palpable truths, which are the object of common sense, I hope I shall be borne with, while I state the train of reflection, that has led me to the conclusion, that the foundation of the criminal law is to be laid in those common principles of our nature, which are implanted within us for the resistance of aggression, and the defence of our just and unalienable rights. If I shall be able to shew, that there is a class of excitements, not depending on slight and casual contingencies, but uniform and constant in their operation; and that these are under the direction of the reasoning faculty, and are intended to promote our well being in society, it will go a great way towards satisfying the inquirer; and, I hope, will justify me in requesting his attentive consideration to the arguments I shall employ.

In looking into the natural history of man, one of the most striking characteristics of the species is a class of principles seated within him, which we denominate *appetites*, *passions*, *affections*, and the like; and another class, which is known by the various names of *reason*, *understanding*, *intellect*, *judgment*, &c. intended to express those operations

of the mind, by which the instinctive, or involuntary, principles are to be controlled and regulated. How far they are capable of being altogether subjected to reason is matter of conjecture ; but it is certain, that the ascendancy of this god-like faculty is aided and confirmed by a suitable education, and the formation of virtuous habits, which have a tendency to weaken the effect of the appetites and passions, and yet, at the same time, to encrease the disposition to practical virtue.

This singular constitution of our nature, which is luminously illustrated by Bishop Butler, points out an admirable economy in our involuntary excitements suited to the most important ends ; and establishes, if there were no other argument, the idea of their order and design, which we before insisted on. If we look to the variety of affections with which we are endowed, to their endless modifications, and mixed natures, the wonder will not be that we know so little of them, and that so many contradictory systems have been promulgated, but rather that we have been enabled to obtain any knowledge of them at all. The more we study them, the more we find them con-

sistent; and though it must be confessed, that our acquisitions at present do not enable us to particularize, without involving ourselves in inscrutable mysteries, yet it would be giving a very parsimonious credit to the Author of our being, if we were to withhold our faith in the order of the whole, because we do not comprehend all its parts; and attribute every thing to chance that cannot be analyzed in our alembic.

However irreconcileable the systems of Philosophers may have been in attempting to account for the origin of the multifarious feelings seated in the human breast, or of reducing some of them to an unexceptionable place in their respective arrangements (much of which difficulty is to be attributed to the penury of language,) none of them have questioned such truths as these---that we have pleasant and painful feelings---an apprehension of good and evil---and a desire to promote our well-being, and not the contrary. To determine the primitive sensation from which all others flow is not of much importance in a practical view; and as it cannot be attempted without a theoretical foundation, it has a tendency to fetter the mind, and to circumscribe it by the narrow prejudices

which all pertinacious systems are apt to raise; but with this, every considerate mind is perfectly satisfied--that we are endowed with *appetites, passions, affections, and emotions*, which are designed to enable us to fulfil the great end of our existence. These again are cardinally divided into complacent feelings, which we call *Love*; and, displacient feelings, which we call *Hatred*: but it is so natural to attribute to the instrument or means of good or evil, the good or evil itself, that, by a figurative expression, we apply the terms more commonly to the cause than to the abstract effect; and are habituated to love whatever contributes to our well-being, and to hate that which has a contrary tendency.

Another prominent division of the passions has been into the selfish and the social, and though the line which separates them is not easily defined; yet, for our purpose, it is enough that such a distinction is acknowledged, as the circumstance is indicative of a constitution of nature suited to man as a social animal, and not as a hermit; and "it is," as Dr. Reid has justly remarked, "not more evident that birds were made for flying and fishes for swimming, than that

man is made, 'not for the savage and solitary state, but for living in Society.'

A system, which has the individual and social happiness of man for its object, by the means of a conflict of the selfish interests, must necessarily require a number of subordinate props and checks not to be perceived on the first enunciation of the principle. The interests of one must often-times interfere with those of another; and we might expect that in private life this clashing must so frequently occur as to give occasion to blows, and even to death; and yet we find so steadily is the equilibrium of the different passions sustained, that, in a society advanced beyond the mere dictates of animal principles, such things seldom happen, or if they do, they are unanimously reprobated.

If the desire of wealth, of power, or of knowledge, engross the mind in an undue degree, it defeats the ends of existence; and hence we see a variety of restraints introduced into the scheme of moral government in order to prevent such a catastrophe. The success of the system is apparent in the circumstance, that very few persons fall a sac-

rifice to entire selfishness. Indeed, the man who should be found totally destitute of benevolent affections, in his intercourse with his neighbours, would be banished from society, and proscribed as an enemy to his species.

But these desires, when kept within reasonable bounds, are not only laudable, but tend in a pre-eminent manner to encrease our happiness. What would overcome the sluggish tempers of most men, in the important concerns of life, but such stimulants as these? We experience at this moment to our sorrow the fatal effects of deranging the course of nature with regard to the appetites. We have taken away the motives to industry from the poor by giving them ample support without earning it; and they have lost the larger share of their once honorable character, because their happiness is not made, as it ought unquestionably to be, to depend upon their conduct.

On the other hand, this constitution of our nature is fortified by a variety of out-works, which become the more formidable, as they are directed and defended by the rational faculties. Thus fear, shame, re-

morse, courage, contribute to protect us in the pursuit of whatever is justifiable; and yet operate as formidable checks when we overstep the bounds of moderation, and would unreasonably grasp at that which is denied us.

In looking into ourselves, we find another class of feelings, very distinct in their nature, which are intended more particularly for the defence of our persons, characters, and property. These have appropriate names in many cases suited to distinguish the particular character of the feeling; and as it partakes more or less of the animal or rational part of our nature. As this is the point to which all the previous remarks on the passions have tended; and the future argument rests considerably on the view I have taken of the connexion that the right of punishment has with this class of passions and emotions, I must solicit the patient attention of the reader to examine them rather at large.

“ Anger is the strong passion or emotion, impressed or excited, by a sense of injury received, or in contemplation ; that is, by the idea of something of a pernicious nature and

tendency, being done or intended, in violation of some supposed obligation to a contrary conduct. It is enkindled by a perception of an undue privation of that to which we thought ourselves, in some degree or other, entitled; or of a positive suffering, from which we claimed an exemption. These are obviously the exciting causes; though our ignorance, or inordinate self-love, may suggest erroneous ideas respecting our claims, or render the resentful emotion very disproportionate to the offence."—  
"When the injury appears great, totally unprovoked; too recent or sudden for the mind to call up motives of restraint;—when surprise at receiving an offence from a quarter the most remote from expectation,—or astonishment at base and ungrateful returns for benefits conferred, accompany the first impulse of passion, an ardent desire of revenge is immediately excited. The imagination runs over every circumstance of aggravation; depicts the offence as a crime of the most atrocious nature; and vengeance is denounced against the aggressor, as an indispensable obligation of justice, and as a retribution due to the violated laws, of morals, of honor, or of gratitude."\*

\* Dr. Cogan's Philosophical Treatise on the Passions, p. 106. & seq.

The nomenclature of this class of feelings is worth noticing. *Anger* seems rather a general term\* employed to express all those emotions of the mind, where a sense of injury, fancied or real, is enkindled. Among the undisciplined portion of mankind it seldom assumes any of the milder forms, peevishness not being an infirmity to which they are very liable. Like the ocean, however, though not disturbed by every breath, when they *are* moved, they rise to the most ungovernable excesses, without any regard to reason, or staying to enquire whether there is any cause for it. Some spirits are at once excited to a violent paroxysm, and lose all self-command. This is the extreme of the passion, and is denominated *Rage*. It is somewhat irreconcileable that, the law should treat with tenderness those, who disregard its injunctions while under the influence of this impulse; and yet visit the drunkard with condign penalties for acts committed during his aberration. Surely they are both excesses arising from a want of self-command, and it is too nice a distinction to say, that the one originates in an in-

\* I apprehend Dr. Paley has mistaken the matter when he makes Resentment the genus, and Anger the species.

firmity of our nature, and the other in a corruption of morals.

*Wrath* is not so much a paroxysm, as it is a settled excess of anger. Cogan says, "It may be seated in a breast possessing too much self-command to will the infliction of punishment, though it notices and dwells upon every circumstance of aggravation; and though it should resolve to punish, it is capable of being appeased by the concessions and penitence of the offender."

*Revenge* is characterized by a state of mind, in which the desire of inflicting punishment predominates, the gratification of which seems to satisfy the incensed person. It is totally deaf to reason, and is of temporary duration, as it assumes the name of malignity when it has a fixed hold on the temper. It is, exemplified among savages in a most frightful degree; and Mr. Hearne, in his travels among the Indians of North America, has given some curious, though revolting, relations, which seem to justify the idea, that the most ungovernable state of the passion may be appeased instantly, and the person reduced to the tranquillity of a lamb,

by meeting the supposed cause of the wrong, and avenging it on him.

*Resentment* is a less degree of Revenge, and bears a similar relation to it that Wrath does to Rage. It is the height of displeasure against an offender. It never rises so high as to become totally ungovernable, but will admit of being rationally directed. It expresses itself by angry looks and words, and even admits of an active expression of our displeasency by inflicting pain; but does not find the gratification, as in Revenge, in the infliction of excessive retributive punishment. It may exist in the bosom where a benevolent disposition towards the offender prevails. *Retaliation* is rather the act of re-quital, instigated by revenge or resentment, and not a feeling.

We use the word *Indignation* to express that species of anger, which we feel against persons guilty of ingratitude, dishonor, baseness, or of any action, that is particularly unworthy and despicable. It is nearly allied to Contempt. It has no inclination to retaliate; but is limited to the feeling of displeasure.

“ That which is a more feeble temper is *Peevishness*, and languidly discharges itself upon every thing which comes in its way ; the same principle in a temper of greater force, and stronger passions, becomes *rage* and *fury*. In one the humour discharges itself at once ; in the other, it is continually discharging.”\*

*Suspicion* and *Jealousy* are other feelings to which we are subject, and of near affinity to some of the foregoing. The latter is a most baneful passion, “ strong as death,” if suffered to feed upon the fancied fears by which it torments itself. The mind that is harassed by this “ green-eyed monster,” is alternately the sport of the most passionate fondness and the most cruel revenge.

The reader is not to suppose, that these definitions comprehend all the modifications of the feelings of this description ; but that they are some of the most familiar and apparent ; and have obtained names, not very definite, from the necessity of having some short signs to express the leading characters. To corroborate this I need only mention those

\* Butler’s Sermon on Resentment.

sudden snatches, which we employ to save ourselves from mischief, when we lose our equilibrium, or are in danger of falling from any height. These are remarkable instincts to protect our persons, which nobody questions, and yet we have no words in our language to designate them.

It is of importance to remark, that the passion of Anger is never excited without the attention being directed to the specific cause of the excitement ; and that it always has an immediate reference to the character of its object. This is not necessarily the case with the passions of Joy, or Sorrow, or Fear ; which are, like Anger, usually denominated principles of self-love. It seems connected with the selfish passions on the one side, and with the social ones on the other, exciting in the incensed person a deep sense of injury, and a desire to inflict punishment on the offender. The corporeal system also partakes of a violent emotion, assuming attitudes and appearances corresponding with the mental agitation. The muscular strength is increased ; the courage rises to fearlessness ; the fists are clenched ; the countenance reddens ; and the eyes flash indignation. *Furor arma ministrat.* The very reverse of all this takes

place in the guilty object of our passion. He too feels a violent emotion; but it is the enervation of his strength; the fall of his courage; the pallidness of his cheeks; while fear, remorse, and shame, inspire him with the dread of meeting the retribution which he knows to be his desert, and which is called *punishment*. "Upon certain actions," says an ingenious author,\* "hurtful to others, the stamp of *impropriety* and *wrong* is impressed in legible characters, visible to all, not excepting even the Delinquent. Passing from the Action to its Author, we feel that he is *guilty*; and we also feel that he ought to be punished for his guilt. He himself, having the same feeling, is filled with remorse; and, which is extremely remarkable, his remorse is accompanied with an anxious dread that the punishment will be inflicted, unless it be prevented by his making reparation or atonement." This necessary relation between the sufferer and the delinquent is, in my view, of great importance to prove, that it is a part of the constitution of our nature intended to protect us against wilful aggression; and consequently to promote the happiness and improvement of society.

\* Lord Kaines' History of Criminal Law, p. 1. See also note (B) Appendix.

The next observation to be noticed is one, which, as far as my reading has enabled me to judge, was first made by Bishop Butler\* in an admirable sermon on Resentment; and since enlarged upon by Lord Kaimes in his "Elements of Criticism," and "History of the Criminal Law;" and again by Dr. Reid in his "Essays on the Active Powers of Man." It is this; that Resentment is of two kinds, the one *hasty* and *sudden*; the other *settled* and *deliberate*. Common language does not supply us with terms to distinguish them; and what Butler has called *hasty* and *sudden*, Lord Kaimes has called *instinctive*, and Dr. Reid *animal*. The unanimous sentiment of these illustrious authors is, that we possess a passion, in common with the brutes, which is enkindled instantaneously by a sense of injury threatened or received, without any regard to reasonableness; and has its origin in the mere instincts of our nature. Such is the anger of infants; and not very unlike, is the senseless vengeance, which a disappointed gambler will wreak upon his cards and dice. Reid indeed differs from Butler in thinking there cannot be resentment against a thing,

\* Vid. his Sermons, Ser. VIII.

which at that very moment is considered as inanimate; but the point in hand does not hinge upon this. They also agree, that the exercise of this instinctive feeling, when under the direction of the reason, is fully authorized, and of the utmost importance to our well-being.

The whole of animated nature is provided more or less with the means of defence. Even if we examine the vegetable world, we shall find a variety of means employed to protect the numerous species of it from injury. To some are given thorns; to others prickles; to others hairs of a viscous quality; to some unpleasant scents; and to a few the power of destroying their enemies.

Animals again exhibit a similar economy in a more extensive degree. The teeth and talons of the feline tribe; the horns of kine; the tusks of the elephant; the heels of the horse; the fangs of the serpent; and the sting of the bee and wasp; are of this kind, with innumerable other instances, which form an amusing study in natural history. Some which are denied formidable weapons, have the power of repelling the assailant by insupportable scents; or by being endowed

with a larger share of timidity and swiftness, so as to elude their pursuers.

Most of those animals, to which nature has given the means of defence, are capable of being excited to fierce anger ; but perhaps no stronger instance of pure animal resentment can be referred to, than the *storge* of females. It is alike violent and sudden, regardless of danger, and seems to inspire a little creature, usually timid and weak, with the greatest courage and a preternatural strength.

Does any person doubt the end of these passions as implanted in animals ? And is it not a principle pervading every part of the animate world, that what the Deity has condescended to create, he has endued with the means of self-preservation and protection, in different degrees, and that none are left totally destitute of them ?

But man, like the animals, is surrounded with a variety of enemies, whose powers of mischief are encreased as they rise in the scale of being. His own species is for ever on the watch to take advantage of his slumbers ; to benefit themselves by encroaching

on him; to encrease their own possessions by intrenching on his. Nor will there be wanting some in every stage of society, who will gratify their own selfishness by violent attacks upon person and property; or, what is equally dear to man, by filching his character, which the virtuous value for its own sake, and which the vicious do homage to by the indignation they express when it is slandered.

To be thus exposed to the loss of property, rightfully obtained, be it ever so small, and of character, and of life, without any means of resisting the injury, would be to suppose, that the Deity has endowed us with the means of oppression without the means of resisting it; and that force and tyranny might riot in the world to the utter extinction of right and virtue. Such an idea involves a contradiction not to be endured.

The prescience of God, however, has not abandoned his designs to such a consequence. He has not even left--as among animals,--agression to be opposed by agression, or force by force; but he has endowed the man, who has right and virtue on his side, with a class of passions fully adequate

to vindicate his cause; and such as will inspire him with preternatural strength and courage (as in the instance of mothers just now alluded to), while at the same time the mind of the delinquent is filled with terror and pusillanimity.

“The reason and end,” says the admirable Butler, “for which man was made thus liable to this passion, is, that he might be better qualified to prevent, and likewise (or perhaps chiefly) to resist and defeat sudden force, violence, and opposition, considered merely as such, and without regard to the fault or demerit of him who is the author of them. Yet, since violence may be considered in this other and further view, as implying fault; and since injury, as distinct from harm, may raise sudden anger; sudden anger may likewise accidentally serve to prevent, or remedy, such fault and injury. But, considered as distinct from settled anger, it stands in our nature for self-defence, and not for the administration of justice. There are plainly cases, and in the uncultivated parts of the world, and where regular governments are not found, they frequently happen, in which there is no time for consideration, and yet to be passive is certain

destruction; in which sudden resistance is the only security."

Nor does the wisdom of nature stop here. For as in the lowest state of civilization mankind are prompted by motives and instincts more nearly approaching to those of the brutes; so, as they advance in knowledge, these motives and instincts become subject to the direction of the reason; and are suited to serve man more perfectly in his improved state, and to carry him forward towards higher attainments. Thus, it is not necessary for those, who would be guided by a high sense of good, to oppose the aggression of the wicked by giving way to violent ebullitions of rancour and revenge, in the way that an undisciplined mind would do; but they have a far better security in that deliberate and settled resentment, which Bishop Butler has so amply vindicated; and which the Apostle Paul has sanctioned by the laconic precept, "Be ye angry and sin not."

It has been remarked before, that as the rational part of man prevails, the animal instincts, which are the forerunners of the better principles, become less violent. This

is a truth so important as to be worth a further illustration. It would seem, that the end for which the instincts are created is not hazarded by their becoming weaker, provided that the principles of reason are strengthened: but, on the contrary, an improved motive of action is ingrafted upon that which was only an animal propensity while there was little reason to guide it. Thus improved, it is less impetuous, but more durable; not propelling by enthusiasm, but making its way by constancy and perseverance.

Thus in the case of the benevolent affections, the animal man, upon the bare sight of wretchedness, has all his sympathies roused at once into passion. He does not stay to inquire into causes, and deserts, and consequences, but administers superfluously to the necessities of the object without reason or forethought. The conduct of the truly virtuous man is very different. He is not instigated by the same impetuosity, yet the sufferer is not in equal danger of being neglected; for his benevolence is not alternating between the extremes of heat and cold; but its temperature remains steady, and is always sufficient to invigorate him for beneficial pur-

poses. But then, as he has not at command the means of relief to an infinite degree, whether they be time, talents, or money, he inquires into causes, and deserts, and considers consequences, and selects his objects so as to keep this maxim in view—always to apply his means in such a manner, as, in his judgment, shall appear likely to communicate the largest share of happiness. It will not, I trust, be inferred from this, that he is to stand unmoved when some dreadful casualty happens: for both reason and experience determine, that the *virtuous* man is not behind the *instinctive* man in prompt assistance upon such occasions.

Perhaps the character of Howard may be thought an exception to these doctrines; but his was a mind of so peculiar a structure, that the equanimity, which was constant to him, exceeded in intensity the paroxysms of most minds with similar pursuits, just as a large river exceeds in constancy and majesty the swollen stream.

Similar applications may be made to the subject of Anger. This passion, as exhibited in uneducated persons, has all the characteristics of a merely animal propensity. It is

violent, ungovernable, temporary, giving for the time such a propulsion to the strength and courage as seems preternatural ; but soon subsiding into coldness, or a settled malignity, which is quite a different feeling. The first attack of Turkish soldiers, and indeed of all rude nations, is a remarkable example. But if well disciplined troops can sustain the shock, (which those who have witnessed it describe in the most terrible colors) fortitude soon puts to flight those who are actuated by this temporary paroxysm, and have nothing to support them beyond the animal passion. The same thing occurs here, as in the exercise of charity. Those who are excited by the instinct alone, though they do great things for a time, cannot carry on a prolonged system, which requires reason, conscience, and moral judgment to guide it.\*

In order to see the object and end of the passion of Anger, let us imagine for an instant some neighbour suffering by injustice, supposed or real. A sympathy is universally excited in his behalf—every one who hears the relation kindles into indignation, and thus a whole city, and by the aid of the press,

\* See Note (C) Appendix.

a whole nation is enlisted under the banners of the injured person, and against the perpetrators of the injury. It is not sufficient to object to this feeling that it is unnatural, and that we are liable to become the supporters of evil as well as of good. The cause is thought to be good, and the feeling is excited. If it be otherwise, the error arises from the want of judgment, which is quite another thing. Besides, the excitement would not have followed had the cause been esteemed *bad*. Does not this plainly demonstrate that these passions are connected with Good and Evil, Virtue and Vice? History and politics afford some striking examples of this constitution of our nature, which will be recalled to the recollection of the reader. Many of them no doubt exhibit the abuse of the passion; but there is this established fact existing among all nations, and evincing beyond the possibility of doubt the existence of certain inherent principles of improvement in the constitution of man, that he has been invariably, and progressively, improving in his condition, wherever the springs of his nature have had free play. This could not be the case if the abuses of resentment were so great as some persons imagine.

Butler has urged so successfully the connection between resentment and vice ; that, instead of lengthening out my own thread, I shall take up his. "The indignation raised by cruelty and injustice, and the desire of having it punished, which persons un-concerned would feel, is by no means malice. No ; it is resentment against vice and wickedness : it is one of the common bonds by which society is held together ; a fellow feeling which each individual has in behalf of the whole species, as well as of himself. And it does not appear that this, generally speaking, is at all too high among mankind. Suppose now the injury I have been speaking of, to be done against ourselves, or those whom we consider as ourselves : It is plain, the way in which we should be affected, would be exactly the same in kind ; but it would certainly be in a higher degree, and less transient ; because a sense of our own happiness and misery is most intimately and always present to us ; and, from the very constitution of our nature, we cannot but have a greater sensibility to, and be more deeply interested in, what concerns ourselves. And this seems the whole of this passion, which is, properly speaking, natural to mankind ; namely, a resentment against

injury and wickedness in general; and in a higher degree when towards ourselves, in proportion to the greater regard which men have for themselves, than for others. From hence it appears, that it is not natural but moral evil; it is not suffering, but injury, which raises that anger or resentment, which is of any continuance."

Hence I am led to make another remark. The distinction between animal and rational resentment may be traced to the principle by which they are excited--the latter being awakened only when evil intention prevails; and the former, not only in the same case, but even where there is no evil premeditated. Thus the one is occasioned by hurt simply, and the other by injury, as distinct from hurt. A man may suffer severely from the hands of another by an accidental blow from a ball in the game of cricket; but the bystanders would laugh at his folly, if he should do any more than feel a momentary resentment. But these same persons, if they saw a comrade receive an unfair blow from the hands of some malicious person, would not only feel a momentary resentment, but a deliberate one; and if they spoke of the transaction after some days had elapsed, and the

first ebullition of feeling had subsided, they would still be incensed, not at the hurt but at the injury ; or, as expressed in a common form of speech, at the indignity received. Deliberate resentment also is excited in proportion to the evil design manifested by the offender, and it is again encreased as the evil proceeds from those who are under obligations of gratitude and love to us. The bitter resentment of relations is proverbial.

Seeing then that this feeling, when rationally employed, has for its cause injury, as distinguished from hurt or pain, it is an inference fairly drawn, that nature has furnished us with this passion as a means of defence; and that it may be considered as a weapon placed in our hands to vindicate our just rights, and to deter the wicked and the grossly selfish, who would otherwise be constantly encroaching, where they cannot be deterred by a respect for virtue.

I need not distinctly, I hope, allude further to the abuses of the passion, which are not more remarkable in this than in the rest; and if the benevolent affections are exposed to the same imperfect exercise—a fact that has not been disputed—can the liability to

abuse of a selfish passion be a reasonable objection against it when rationally directed? The reader will think I have delayed him long enough on this branch of my subject; I shall therefore proceed to examine how we may lawfully pursue the object of the passion.

It is to be remarked that the proper objects of deliberate resentment are the defence, protection, and safety of our own persons, and whatever rightfully belongs to us, in the first instance; and then of the persons of others, and whatever rightfully belongs to them. There must be some overt act to justify us in repelling the offender by forcible means. If he should only avow vice in the abstract, this will not be sufficient to call down active resentment. We may feel indignation at such conduct, in the same manner as we feel it against vice and wickedness generally. But as the passion of rational resentment admits of our employing proper means of defence, it at the same time limits the object of the offended person to defence alone, and entirely excludes all idea of retribution and retaliation, or of wishing to inflict pain for its own sake. *He* will have learnt to subdue the animal part

of his nature very imperfectly, who is in the condition of the famous Indian warrior, Brandt, who replied to the remonstrance of Sir John Johnson, that " Since he had killed the officer, his heel was much less painful to him than it had been before."\* Revenge and animal resentment find their relief in such conduct; but no one, who wishes to be guided by his conscience and reason, ever desires to inflict pain to assuage his own; but always with a view to benefit the party suffering it. It is quite clear, that though injury may be opposed and prevented, it is not to be done by any and every method the incensed person may choose to employ. It is absurd to suppose that it would be a rational resentment for one man to take away the life of another for every trivial offence. Nature indeed has plainly provided against such excesses; for though an offender is inspired with dread as long as resentment is just, yet if it runs into vengeance, and has no bounds, *his* resentment also rises; the two parties change places; and force becomes opposed to equal force. This is a part of our constitution which cannot be mistaken. The spirit and precepts of reli-

\* Weld's Travels in America, Vol. II. p. 257.

gion and the sanctions of reason, support the same; and thus, while they confirm the existence of such a means of protection, they admonish us to exercise it moderately, as the surest way of obtaining our end.

It is not possible to lay down the course by which men, without social law to govern them, might justly repel aggression; because habits and customs have happily changed our views on these subjects; and, in the state of society in which we live, the only direction we could give to any injured inquirer would be to leave his cause to the laws of his country. We are therefore excluded from treating the question so practically as might be wished. Every mode of vindicating ourselves, where it is necessary to employ force (excepting some extreme cases,) would be indignantly rejected by a dignified and virtuous character as unfitting to be employed by him; and we cannot put ourselves in the situation of a savage unrestrained by social law, and see how a rational exercise of resentment would then guide us. It is this kind of difficulty which presents the greatest obstacle to moral and political truth. We are obliged to rely upon its abstract properties.

The subject, however, is not totally destitute of a practical illustration. No law, that has ever yet been modelled, has attempted, or wished, to extinguish this class of feelings, but only to regulate them. Hence we are left in many emergencies to follow the course that nature has dictated ; and such is the success attending this plan of proceeding, that any law, which should be proposed, to take the natural vindication out of our hands, would operate very disadvantageously upon society. Thus burglaries, highway robberies, and murders, are, no doubt, restrained far more by the fear of a summary punishment, arising from resentment, than they are by the severest legislative measures. In these cases the law justifies us, as well as nature, in putting ourselves upon the offensive ; and it is a much more terrible retribution to the criminal, and operates infinitely more as an example, to feel the vengeance of the injured party while in the very act of despoiling him. It is this dread, which drives culprits to innumerable artifices, in order to attain their ends by means, which do not expose them to the chance of immediate detection.

Lord Kaimes has collected some instan-

ces where this natural vindication has been attempted to be preserved in the administration of social law.\* Among the Athenians, a person suspected of murder, was first carried before the judge, and, if found guilty, was delivered to the relatives of the deceased, to be put to death, if they thought proper. In cases of infidelity the adulterer was delivered to the husband to be punished at his will. He that stole a child, was delivered to the child's relations to be put to death, or sold, at their pleasure. In Abyssinia, father Lobo informs us, a similar provision is adopted ; and some abhorrent crimes are prevented in this country almost entirely by the indignation, and sometimes revenge, which the public express towards the perpetrators of them.

Nothing is more apt to misguide us in resentment than inordinate self-love. It is sure to represent the injury as greater than it is, and to blind us to every circumstance that would alleviate, in the opinion of others, the evil intention. In vain it is represented to the offended person, that he has misconceived or misunderstood the words, or ac-

\* History of the Criminal Law, p. 22.

tions, which are the cause of offence. He is resolute in magnifying and distorting every thing by his perverted vision. He runs over the aggressor's history; recalls the various instances of obligation; depicts the generous offices done to him; and sees nothing but ingratitude and hypocrisy throughout the conduct of his life. Thus we are deceived by the illusions of the imagination, which is no more to be trusted, in such cases, than as if we were under the influence of a temporary insanity.

The surest criterion for determining on the degree of resentment which should actuate us, is to throw out of our consideration all idea of personal injury, and see how we should recommend another person to act, who was the subject of the like aggression. I am aware that the best men of whom we have any experience, have not attained to the perfection here recommended; but it cannot be doubted, that as we get rid of infirmities, and are formed into good habits upon right principles, and are still striving to purify them, we are enabled more easily to guide and subdue the animal part of our nature.

The exercise of rational resentment is by no means incompatible with good-will towards the offender. This is confirmed by what we daily observe occurring between parents and children, and between other relations and friends. Indeed if the passion be justifiable in proportion as it is excited against injury that is wilful, and the object of inflicting pain, is not the gratification of vindictive feeling, but solely as a means of defence, there is nothing that forbids the return of complacency and kindness; especially if the fear of injury be removed, and the sufferer manifest a sense of his fault and is penitent. The gratification of resentment, under all its aspects, is so intimately directed towards the occasion of it, that men are almost always disarmed when the offender expresses sorrow for his conduct. When the feeling survives this contrition, it assumes rather the character of malignity, which everybody abhors.

It may be urged by way of moderating the excesses of resentment, and keeping it within the limits which reason points out, that we should consider the motives of the offender, not only without prejudice, but even with charity. If we have any personal inte-

rest in the case, or our feelings have been greatly roused, we may be assured, that we are more likely to err on the side of severity than of lenity. This should moderate our deliberate anger. Then again, we should do well to think of the various alleviations, some of which *actually* attend, and others *may* attend, the injury we would avenge. Scarcely any act is so depraved but what fallible mortals, like ourselves, may find some mitigation without being guilty of misprision of vice. The interrogatory of the pious Boerhaave might very seasonably occur to the recollection on such occasions, "Who knows whether this man is not less culpable than me?" Ignorance, bad education, indigence, the force of example, strong temptation, and even the very constitution of the temper, may contribute to lessen the moral depravity, and consequently the injury, or evil, which we determined before was the only fit object of resentment. And as some men may have worse organs of sense than others, so with regard to the mind, both the capacity of the understanding, and the means of improving it have oftentimes no dependence on mens' wills; "And therefore," says Dr. Samuel Clarke, "no man is answerable for having a larger or smaller capacity, or for having more

or fewer means of information: But he is accountable for the use of that degree of understanding, and for the use or abuse of those means of knowledge, whatever they may be, which God has thought fit to afford him. A man may shut his eyes, and may chuse darkness rather than light: Or he may through wilfulness or passion, chuse to follow a false light instead of a true one; an imaginary spectre instead of a reality: Or he may put out his eyes and bring himself under a sort of necessity of blindly following some Guide, who (as it happens) may equally lead him in the right way or the wrong one. A man may by negligence, or by wilfulness, or by love of Vice, or by any customary and habitual ill practice, pervert or blind his own understanding. He may by rejecting the means of discovering the truth, through his own fault, and not through want of capacity, form to himself ill principles instead of good ones.”\*

In this extract, (and my limits oblige me to terminate it too soon) we have a just criterion for estimating men’s actions; and surely, if, on occasions of resentment, we were ac-

\* Clarke’s Sermon “On the Nature of Human Actions.”

customed to regard the nature and equity of things, we should be much more disposed to forgive, as far as we ourselves were concerned, than severely to retaliate. It must however be remarked, that this christian doctrine of forgiving enemies by no means affords a reason why an injured person should not stand on the defensive, or that a delinquent should not be restrained from doing evil. It only takes away the bitterness, that is apt to be mingled with that restraint.

Here I am naturally led to make some observations on punishment, as connected with the passions whose nature we have been discussing. This point, and another referring to the extreme case of taking away life, have been reserved for this place, that the reader might be made acquainted beforehand with the least polemical part of the subject; which, it is hoped, has prepared his mind for entering upon questions, on which the public has been much agitated—perhaps too much so to enable it to come to an unprejudiced decision.

The term *punishment*, though of such constant occurrence, is not easily defined. Thus one author will speak of it as a debt incurred

by an injury, and to be paid by a certain quantity of suffering ; Dr. Johnson explains it to be, " any infliction or pain in vengeance of a crime." Adam Smith says,\* " To reward is to recompense ; to remunerate, to return good for good received. To punish, too, is to recompense, to remunerate, though in a different manner ; it is to return evil for evil that has been done."—" Punishment is generally used to signify the voluntary infliction of evil upon a vicious being, not merely because the public advantage demands it, but because there is apprehended to be a certain fitness and propriety in the nature of things, that render suffering, abstractedly from the benefit to result, the suitable concomitant of vice."† " Punir, dans le sens le plus général," says Bentham, " c'est infliger un mal à un individu, avec une intention directe par rapport à ce mal, a raison de quelque acte qui paroît avoir été fait ou omis." He is driven, however, to revive an old word to express the precise idea he wishes to convey, and which he calls *punition*.† His definition of vengeance, I apprehend, more nearly conveys, the sense in which punishment is usually employed. Blackstone felt the same

\* Theory of Moral Sentiments, Vol. I. p. 146.—† Godwin's Political Justice, Vol. II. p. 689.—‡ Theorie des Peines et des Reompenses, p. 2.

difficulty, entertaining as he did the idea that the end of punishment was not by way of expiation for crime, and hence he defines it to be, "evil or inconvenience consequent upon crimes and misdemeanours."<sup>2</sup> But there is no end to logomachy. The prevailing idea, though so difficult to express, is, with few exceptions, sufficiently uniform to justify this conclusion, that "Punishment is the infliction of pain, intended as a retribution for some evil which is done." The retributive character, I conceive, is essential to the idea; and if it be wanting, the infliction of pain is not punishment but something else.

The question therefore to be determined, is, whether *punishment*, thus conceived of, is the right end of deliberate and rational resentment?

Punishment then, in its proper acceptation, has regard to the moral character of the action by which it is occasioned. It is opposed, as we have seen, to reward; the one being connected with merit, and the other with demerit. This connection is necessary to the moral government of God, who cannot but regard with favour those who have aimed at fulfilling the end of their existence,

and with displaceney those who have acted contrary to that end. This is plainly the disposition of things even in this life ; that if we pursue right ends we shall obtain happiness ; and, on the contrary, if we pursue wrong ends,—and be it remembered we cannot act without proposing to ourselves some end—we shall obtain misery. If these are not the consequences, it will be because the delinquent has seared to insensibility some of his best instincts and faculties.

But revelation points out to us a more certain connection between virtue and happiness, vice and misery. In this world we witness the relation only as a general tendency ; in the future state every man shall be rewarded as his works have been. *“The wicked shall go away into everlasting punishment, but the righteous into life eternal.* Here it is that strict justice will be distributed to every man. Such is the awful attribute which will then be exercised, that the human mind cannot conceive of it ; and we may perhaps be pardoned for illustrating the crude ideas we have, by the figures of measure and quantity and proportion, of a debt that is contracted and to be discharged, all of which are similitudes taken from the

nicest adjustments, which art has discovered to regulate human affairs. But though these phrases may be the best we can employ, they are exceedingly liable to be abused as experience bitterly testifies ; and all that we can safely argue from is, the general truth, that every man, who has contradicted the end, which the Deity proposed in creating him, will be punished consistently with the divine justice and goodness.

Now in order to appreciate the merit and demerit of mens' actions, we must be made acquainted with the moral character of them, and this requires such an insight into the past as can be possessed only by an omniscient Being. True it is that we can pronounce a tolerably just verdict on some of the more atrocious offences ; but the greater number of the smaller depend for their criminality on such numerous and remote contingencies, as to elude the most vigilant intellect. That is properly a man's action which he wills and determines ; and then again, this will and determination are influenced by motives arising frequently out of parentage, education, temper, capacity, biasses, and a thousand other things which we cannot know, nor perhaps even the agent himself. But

even supposing that we are acquainted with enough to pronounce on the character of a specific action,—who has determined the common standard by which vice and punishment, taken in the usual sense, are to be measured ? By what means are we enabled to settle the relative proportions of suffering and evil ? Revelation does not assist us, and yet nothing short of it, can enable us to determine the question ? That there is an intimate connection between premeditated injury and a retributive return, considered abstractedly, is a truth arising out of revelation ; but who can perceive the practical relation between a theft of five shillings and a certain number of stripes ? and whether they ought not to be more or fewer ?

On the other hand, if we take as our guide the general laws by which it has pleased God to govern the affairs of men, independent of revelation, I cannot perceive how punishment can be justified as the right end of any human passion. It is sometimes the proposed object of revenge, and the other excesses of anger ; but, as we have argued before, the objects of a rational resentment are not pain, for the sake of gratifying the feelings, nor pain as a retribution ; but pain as a means of

defence to prevent injury, which is doing or threatened to be done. Punishment and defence are two as distinct ends as well can be proposed to rational beings, and we find all mankind making the distinction. Punishment has a view to what is past and irrecoverable, defence to what is future. The former, as exemplified in this life, is so nearly related to vengeance, and the returning evil for evil, that I cannot think the bulk of mankind would be able to separate them ; and it is an argument in my apprehension of considerable weight, that we should prefer the rule of action intelligible to common understandings, rather than another which can be treated of only by casuists and philosophers.

Resentment, say some writers, inflicts punishment not only as a retribution to the offender, but as a preventive of future injuries, which may arise from himself or others. The former part of this opinion has been discussed ; let us consider the latter.

It appears then, that one man having injured another, is not only to be punished for his own misconduct, present and future, but for the misconduct of others. Such surely is the end which men propose when they

threaten to make an *example* of their fellow creatures. Their meaning evidently is, that they will deal out such a measure of severity, as shall not be proportioned to the crime, but as shall by its terror deter men from repeating it. If the retribution of offences, and the offences themselves, be correlative, as these reasoners insist, the relation is here destroyed. What degree of punishment can be commensurate with the crime, or how can a crime be said to exist, which may, or may not, happen at some future time? What relation is there between one man's action and another, so as to make them reciprocally accountable to a moral tribunal? A man can be answerable only for his own conduct, and therefore cannot be punished for that of any other person. The doctrine of inflicting pain for the prevention of future injuries, or which is the same thing, of *exemplary punishment*, appears to me so untenable, that I am at a loss to discover what may be said in its support; and I apprehend some eminent writers, among whom may be reckoned Dr. Paley, have employed the phrase with very vague notions of its import.

Many persons justify this mode of proceeding by the necessity of the case; con-

ceiving, as it is manifestly the end of providence that order and virtue should prevail in the world, the means employed must be such as will enforce it ; and they therefore regard exemplary punishment as an additional mode of striking terror into the minds of the evil disposed, and deterring them from wickedness. Thus they approve of their means by the end they propose, contrary to reason and the principles of christianity.

But the necessity of the case is not so urgent as people may imagine ; for though the ultimate end, as it has been called, of providence may be, that the constitution of men should lead to order and virtue, yet it does not follow that this end is to be attained by that path alone, which fallible men may point out. We have daily experience of right ends being produced in nature, by means the very opposite to those which we should have employed ; and we see besides, that many ultimate ends are attained, without, if I may so express myself, always keeping the eye upon the mark we aim to reach. There are many intermediate steps which must be made ; and the economy of the world is so ordered, that men are directed and encouraged to attend to their proximate duties ; and the result of

such a disposition is, that they attain remote ends not within their contemplation. Thus a parent who attends to his family, by educating them with care, inculcating virtue, setting a good example, and providing for their wants, fulfils a duty of the most interesting kind ; and yet he does not regard the strength and happiness, he is by these means bringing to the state, any more than he does the sustentation of his body by eating. So it is with the ends we propose respecting deliberate or rational resentment. Our immediate object is defence ; but this operates in such a way, as not merely to attain its direct end, but to deter the wicked from the commission of injuries similar to that which is avenged ; and to establish order and virtue in the world, as effectually as if to deter the wicked and establish order had been our immediate object,

Thus, again, it produces all the advantages we aim at in punishment ; and undoubtedly is better adapted to produce penitence and reformation in the offender. In political and moral affairs, if we do but attend to the proximate obligations, which are intelligible to the commonest capacities, we may safely leave the remote ends to the great Disposer of events. We arrogate to ourselves a great

deal too much when we take into our hands the future destinies of mankind, many of which are but contingencies as far as our views will carry us.

To conclude; it may confidently be asserted that *punishment*, taken as the retribution of moral guilt, can be safely and justly employed only by the supreme Arbiter of the world; and that when fallible men take upon themselves the right of employing it as the means of resentment, it is liable to the most terrible abuse, and will equitably be returned upon them as the reward of their own guilt. *Whatsoever a man soweth, that shall he also reap.* In human hands, it is a mode of avenging our cause, which cannot be distinguished from the doctrine of returning evil for evil; and reason and revelation both join in reprobating this, as destructive of human happiness, and proceeding from viciousness of heart.

These arguments, as they strike at the root of many opinions, which some persons may have regarded as established truths, will perhaps be rejected as carrying us too far, and as taking from us the right of destroying life when our own is endangered. A

little consideration of this extreme case will tend to reconcile such persons to the views here taken.

It has been laid down, I hope, most distinctly to be understood, that defence and protection are legitimate objects of rational resentment; and though we have no right to proceed farther, and take into our hands the attributes of the Divine Being, yet he has, I conceive, fully authorized us to employ the weapons, with which we are armed, for the purpose of defending those important gifts intrusted to our care. If the contrary were the case, and the virtuous were directed to be passive and non-resisting beings; and, at the same time, the vicious were not only empowered, but possessed the disposition (as they most unquestionably do) to intrench upon their rights, and prevent the exercise of the liberty, intelligence, and regard to rectitude, which are the characteristics of virtue, is it possible to doubt what would be the consequence? Order and virtue, which we believe to be the end of the constitution of nature, would be defeated; and disorder and vice, which are *not* the end, would prevail. Such an idea goes to the length of supposing the rational inhabitants of the earth to

be the sport of accident and chance, and not to have proceeded from a righteous Creator.

If the protection of the gifts of heaven, among which must be primarily ranked the gift of life, be a justifiable object at all, it is justifiable in every case ; and it cannot be that we are intitled to resist small injuries and not the greater ; for then we must stop our hand just at the point where the case becomes most urgent. (We may restrain, we may beat, we may repel the delinquent ; but we must not, say these reasoners, take away life.) What is this but giving an encouragement to precipitate murder ? If the doctrine of passiveness or non-resistance were the principle of action among the virtuous,—and if it were of God it must be so—the virtuous might defend themselves from all the minor offences, but they must become the sufferers when exposed to the most heinous. The opposition would be in the inverse ratio of the necessity. I have as great faith in forbearance and remonstrance, as means of overcoming evil, as most persons ; and every one who is placed in the emergent situation, which requires such extreme measures of protection, will do well to consider seriously how far the particular case requires, that he

should proceed to the last extremity. An awful responsibility rests upon him ; and it is no excuse to urge, that it was done by way of example ; and very little, that, knowing better, it was done in a hasty fit of resentment. But there are occasions, on which the best of men may be called to carry into execution this terrible penalty, in order to prevent the triumph of cruelty over innocence ; or to defend the lives and liberties of the "lights of the world :" and the right can, in my humble opinion, no more be questioned, than the right of repelling slight offences, or of expressing indignation at dishonorable and base conduct.

"I cannot but think *necessary self-defence*," says the pious Mr. Grove, "though it proceeds to the *killing of another* to save one's self, is in common cases not only *permitted* but *injoined by nature* ; and that a man would be wanting to the author of his being, to society, and to himself, to abandon that life with which he is put in trust. That a person forfeits his own life to the sword of justice, by taking away another's unprovoked, is a principle not to be disputed. This being so, I ask, whence should arise the obligation to let another kill me, rather than venture to

saye myself by destroying my enemy? It cannot arise from a regard to society, which by my suffering another to kill me lose two lives; that of an honest man by unjust violence, and that of his murderer, if it can be called a loss, by the hand of justice. Whereas by killing the invader of my life, I only take a life, which must otherwise have been forfeited, and preserve the life of an innocent person. Nor for the same reason, can there be any such obligation arising from the love of our neighbour; since I do not really save his life by parting with my own, but only leaye him to be put to death after a more ignominious manner by the public executioner. And if it be said, that I despatch him with his sins upon him into the other world, which he might have lived long enough to repent of, if legally condemned; as he must answer for that, who brought me under a necessity of using this method for my own preservation; so I myself may not be so well prepared, or may not think myself so, or so be assured of it, as to venture without a more exact purifying of my soul, into the presence of my great judge: and no charity obliges me to prefer the safety of another's soul to my own."\*

\* Groves' Moral Philosophy, Vol. II. p. 266, 267.

On this point, I am differing from a most respectable denomination of christians, who will be produced as an example of the efficacy of the passive principles. But perhaps I may be permitted to add, that they feel the difficulty of adopting them practically in the general transactions of life ; and the success which attends their practice on extreme occasions, appears to be attributable to the very small portion they form of society, and that they are protected by the opinions and practices usually prevailing among the rest of mankind. William Penn, however, in the constitution he drew out for the government of Pennsylvania, punished murder by the death of the delinquent. It is a doctrine, that might be adopted if all mankind were virtuous ; but as long as good and bad principles are suffered to exist together in the world, and the vicious have the power of carrying theirs into effect by force, the virtuous will not be forbidden to employ the same means, or it is easy to perceive what must be the issue. The life of a vicious man can never be so valuable as to be preferred to that of a virtuous one ; and the life of no man can be put in competition with the important end of upholding the authority of reason and virtue.

It is a strong confirmation of the justness of these views, that Mr. Gisborne, in his Moral Philosophy, has come to the same conclusions as myself, although he has taken for his premises very different, but sufficiently valid, principles. The proposition he has treated is, that "every man has originally divine authority to deprive another of the gifts of God, or to restrain him in the enjoyment of them, when he proceeds in such deprivation or restraint so far, and so far only, as is necessary for the defence of the gifts of God to himself, or in defence of the gifts of God to those whom he is bound by natural ties to protect, or to those by whom his aid is solicited, or to whom it is deemed acceptable, against attacks unauthorised by God."\* All these points he has enlarged upon with his usual perspicuity. The train of reasoning, which I have pursued, appears to me, in some respects, preferable, inasmuch as it does not require so many assumptions, and I think ascends to the highest source of instruction to which we can apply, independently of the clear and immediate revelation of God.

Without extending these observations on the passions to any greater length, I will

\* Moral Philosophy, p. 117. See also Note (D) Appendix.

draw this chapter to a close by recalling to the reader's recollection the leading consequences which may be deduced from them.

In a former chapter we came to the conclusions,—That the jurisprudence of every community must be founded upon those common principles, which govern mankind in the pursuit of well-being; and that, in no instance, it must attempt to contravene them. In the present chapter, we have come to these results :—That, the passions, affections, and excitements are objects of scientific study, as leading us to some important principles, characteristic of our nature, animal and rational :—That, there is a class of passions intended particularly for our defence, and distinguished by certain peculiarities, which enable us to assign to them their proper functions :—That, anger or resentment, properly regulated, is roused by intentional injuries, with a view to protect ourselves and our fellow creatures from their evil effects; and that the infliction of pain for any other end is unjustifiable :—That, Punishment in the hands of men, either as a retribution for evil already done, or as a preventive against future evil, is not sanctioned by reason or revelation.

These conclusions are a suitable introduction to the next Chapter, which will be employed in making an application of them to the jurisprudence of Crimes and Punishments.

But before I conclude, I shall perhaps be pardoned for cautioning the ordinary reader from being misled by the employment of the general terms Government, State, Society, Legislature, and others of a similar import. They are words of frequent occurrence, but of a very complicated nature; and it is allowed by all acute reasoners, that by no one circumstance are we more likely to be imposed upon. The words themselves are familiar; but the ideas, which they represent, are so complex, and comprehend so many particulars, which are never adverted to, that philosophers themselves are often puzzled. No wonder then that it should be much more common with the bulk of mankind to be imposed on, and to employ them in their deductions as signs, without looking to their signification. How frequently do people talk of the power, and wealth, and wisdom of Government, and the prosperity and happiness of Society, without at all recurring to the complicated nature of such abstract expres-

sions; but attributing to them virtues and vices, good and evil, as if they were real existences in a corporate capacity. No doubt many persons are led to very erroneous conclusions by regarding Society as something supreme, possessing great power and authority, and capable of insisting on, and performing many things, which no individual, or majority of individuals, could possibly effect. The fictions of law, with regard to corporations, have contributed to the propagation of these errors, for they go so far as to create a *propria persona* in the aggregation. Nothing however can be more unfounded than to set up any relations, while we employ these terms, separate from those, which belong to the respective individuals who are comprehended in the general expressions. The French Economists scarcely fell into a greater error than this in all their speculations; and one of the acutest peers of parliament, has lately resuscitated the doctrine by devoting a considerable portion of a quarto volume to shew, that no greater mistake can arise, than to confound public wealth with the aggregate of private wealth belonging to the individual members.\*

\* Inquiry into the Nature and Origin of public Wealth.

It is easy to perceive, that these abstract terms have been personified, sometimes to abbreviate speech, and sometimes to present a more vivid idea to the mind ; and hence, it is not uncommon to speak of the law of the land as possessing will, desire, and perception of right and wrong ; but that these words are employed thus, in a metaphorical sense, must be apparent on the least reflection. To speak in the language of philosophy, the words Government, Church, Body-politic, &c. being artificial signs to express an abstract idea of certain aggregations or bodies of men, it is illogical to reason upon them as if they possessed properties and qualities distinct from the individuals comprehended under the collective or generic term. But this is a very abstruse question belonging to another science ; and I gladly refer the reader to those writers, who have devoted their talents particularly to it, in order to satisfy his mind of the importance of attending to language as a medium of communicating thought.

## CHAPTER IV.

*The inferences drawn in the foregoing chapters applied to the criminal law—progress of criminal law—punishment, at first vindictive—as awarded for injury done to Society—as a retribution—proportion between punishments and crimes—analogical, exemplary, and preventive punishments noticed—defence the proper object—death to be justified only on extreme occasions—corporeal punishments not consistent with defence—imprisonment the best punishment.*

THE principles laid down in the foregoing chapters have, I hope, prepared the reader for entering upon the argument to be prosecuted in this; which will consist of an application of those principles to the subject of Criminal Jurisprudence. As we proceed we shall endeavour to establish a connection between the ethical points, before insisted on, and penal legislation considered as a science; and shall shew the practical inconvenience and theoretical error of the present laws.

It is an observation of Hume, confirmed by many of his successors, that though politics in its early stages, seem to have been the sport of fortune, they are nevertheless proceeding in all modern governments by some regular progression of improvement. And it must be admitted, that no branch of the subject has been left more to the capricious influence of unsettled opinions than that which is now to engage our attention. Absolute power, which characterizes all rude governments, whether monarchical or popular, has been its most constant resting place; and though the prevention of crimes has been attempted by different means in the successive stages of civilization, yet these changes have been so uniform in the various governments of the earth, that they must be attributed to some common origin.

In the earliest forms of society, before injuries to individuals are vindicated as injuries to the body at large, revenge seems to be the only security resorted to. It is the impulse of this passion that protects individuals from oppression and wrong; and indeed such is the importance of it in the constitution of our nature, and so greatly does it contribute to repress the vicious,

that it is not attempted to be extinguished even in the most refined state of manners, when we relinquish as the civilians express it, (I will not stay to examine how correctly) our natural liberty for the sake of a more complete enjoyment of civil liberty. It is also apparent, that there is a class of crimes of so atrocious a character, that they are restrained far more by the dread of this expression of human feeling than they are by the severities of the law; and though there is no visible hand to punish, yet so awful is the tribunal of conscience, when under the apprehension of public malediction, that the artificial forms and solemnities of our Courts of Law are but gossamer threads to restrain the delinquent. It is also an indisputable fact, that murderers and burglars are deterred more by the summary example made upon one detected in the fact, than they are by numerous sacrifices made upon the gibbet,

It may perhaps be suspected that there is a propensity in legislatures, when invested with great authority, to overlook these natural protections of our persons and property, and to rely too implicitly on human systems and institutions to supply their place. I

know not how to account else for the distinction our law draws between the various kinds of homicide ; nor, that it will not suffer any crime, whatever its atrocity, to be prevented by death, unless the same, if committed, comes within the technical rule of a capital offence. Till lately, if one killed another in the defence of his handkerchief, taken from his person, it was justifiable ; yet, if such an event should happen by defending beauty and innocence from violation, the law would regard the defender as guilty of a felony.

But to proceed : If we look into the history of judicial punishments we shall find the same vague and erroneous views prevailing, as in a former chapter we pointed out to be the evident abuses subsisting among men, while they carried into effect the principles with which they are endowed for their personal protection. Their ignorance of their own nature as individuals precluded them from an acquaintance with it as members of society ; and hence we find that legislative punishments have run into all the excesses, which follow from the indulgence of the passion of revenge. Thus it is, that the first establishment of social laws is, in every

community, marked by a ferocious severity against offenders, which is almost wholly of an expiatory and retributive nature, mingled with the terror of example. We find such relentless cruelties as these practised ; sewing the criminals up in the warm skins of beasts and worrying them with dogs ; tearing their limbs asunder by force ; crucifixions, burnings, impalements, whipping to death, flayings, boilings, and other modes equally shocking to decency and humanity.

Judging from the scanty materials which history affords, the penal laws of the Egyptians, the Greeks, and the Gauls were of this nature. Nor can it be denied that the popularity of the government was no security against the indulgence of the passion ; but, on the contrary, the more the public voice was appealed to, the more iniquitous and wanton was the revenge. Nothing can exceed, among all the “fantastic tricks” of power, which have “made the angels weep,” the superlative wickedness of the practice of *Ostracism*, adopted by the Athenians in the height of their glory, and by some other neighbouring states ; and this inordinate capriciousness, with the uniformly ungrateful return they made to their patriots, will

remain an indelible stain on their character ; and shews, that whether the supreme authority centers in one man or a thousand, the danger arises from the prevalence of passion and ignorance over the immutable principles of truth and justice.

The polished Roman was also accustomed to satiate his brutal passion by similar barbarities ;

Castigatque, auditque dolos, subigitque fateri  
Quæ quis apud superos, furto lætatus inani,  
Distulit in seram commissa piacula mortem.

The punishment of the parricide, as we are informed, was to sew him up in a leather sack with an ape, a cock, a serpent, and a dog, and cast him into the sea. It was also usual to cover some offenders with a mantle daubed over with pitch, and then set fire to it. The Emperors introduced a punishment called *Serra-dissectio*, a torture by means of a saw ; *Damnatio ad gladium*, and *Damnatio ad bestias*, were regarded as imperial entertainments. The Roman law permitted the murderer to remain on the gibbet after execution, as a comfortable sight to the friends and relations of the deceased ; *Ut*

*et conspectu deterreantur alii, et solutio sit cognatis interremptorum !\**

The earlier penal law of our own country is written in the same character of revenge. The rack and torture, which were introduced under the sanction of the civil law in the reign of Henry VI, seem always to have been contrary to the laws of the land. But murdering by poison was punished by boiling the offender to death in water.† One heinous offence was recompensed by burying the delinquent alive. Heretics and witches, who are called *horrible and devilish offenders*, were punished with burning; and every one has heard of the ordeal, by which the sibylline functions of the latter description were discovered. Lord Coke regards the 1. Jac. c. 12. as a wise and salutary law worthy of the age in which he lived. It provides, that “ Whosoever shall consult, covenant with, entertain, employ, feed or reward any wicked spirit, or take up any dead man, woman, or child, out of their grave, or the skin, bone, or any part of a dead person to be employed in witchcraft or enchantment, shall suffer pain of death as a felon.” In Ireland there is still

\* Eden's Principles, p. 10.—† 22. Hen. VIII. c. 9.

a statute of this kind, I believe, unrepealed.\* Mountebanks, and the conveyers of Sheep alive out of the kingdom, were subject to death. Forfeitures and corruption of blood have sprung from the same source of legislation. Who would think that the justification of these penalties, as was seriously urged by the lawyers of the seventeenth century, is to be found in *Psalm cix. v. 9, 10, 11, 12, 13?*

Every person is acquainted with the sentence of the law for high-treason, which formerly was as full of vindictive cruelty as was possible. The most offensive and indelicate part of the execution is now remitted, though as late as 1710 it was continued as part of the sentence.† The execution of John Ballard and others, in the reign of Elizabeth, is thus related. “ Ballard was first executed. He was cut down and bowelled with great cruelty while he was yet alive. Babington, another of the traitors executed at the same time, being taken down from the gallows, alive too, and ready to be cut up, cried aloud several times in Latin, *Parce mihi, Domine Jesu!* Savage broke the rope and fell down from the gallows, and was presently seized

\* State Trials, Vol. VIII. p. 250.—† See Note (E) Appendix.

on by the Executioner, his privities cut off, and his bowels taken out while he was alive. Barnwell, Titchbourne, Tilney, and Abington, were executed with equal barbarity.\* Sir John Perrot's sentence in 1600 was, that his bowels, &c. should be cast into the fire before his sight. Henry Garnet, one of the Gunpowder-plot conspirators, was hung, until he was dead, before the remainder of the sentence was executed. Lord Stafford's sentence, in 1680, was, that "your bowels shall be ript up before your face, and thrown into the fire;" but it was remitted to beheading. Fitz-Harris, 1681, had the most indecent part of the judgment omitted, though it was afterwards awarded among others to Busby, a Romish priest; to Lord Russel; to Algernon Sidney; and to Daniel Dammaree so late as the 9th of Anne, though upon none of them was it executed. The embowelling was again practised when some of the rebels of 1745 suffered.† The judgment of a woman for high-treason was to be drawn (and anciently this drawing was done by horses without even a hurdle to protect the culprit from the ground) and burnt, though this seems to have been remitted very soon for beheading. Thus Queen Catharine

\* State Trials, Vol. VIII. p. 250.—† See Note (F) Appendix.

Howard and the Countess of Salisbury, in the reign of Henry VIII., and Lady Jane Gray, in the reign of Mary, had their sentences remitted; and we find in the first year of the reign of James II., that Mrs. Alice Lisle, a lady of inferior degree, was admitted to the same indulgence, in consequence of these precedents.\* The practice, however, continued until the 30 Geo. III, c. 48. What should we think now of the motives of those relations of a deceased person, who should petition to have the murderer hung in chains as a gratification to their feelings ?†

But to say nothing of petit-treason, murder, burglary, highway-robbery, and other great offences, it is felony also, without benefit of clergy, to remain one month in the realm, being an Egyptian; or to be found in the fellowship of Egyptians. It has been made equally capital, if any person shall wilfully break any tools used in the woollen manufacture, not having the consent of the owner; or shall maliciously cut in pieces or destroy any manufacture of linen cloths or yarn; either when exposed to bleach or dry; or shall wander, being a mariner, without the testimonial of justices; or shall knowingly re-

\* State Trials, Vol. IV. p. 129.—† Ibid. Vol. X. p. 39.

ceive, relieve, or maintain, priests or jesuits ; or shall during the term of transportation to the British colonies, voluntarily go into any part of the French or Spanish dominions ; or shall be found in disguise in the act of passing, with prohibited, or uncustomed goods ; or shall forcibly hinder, obstruct, assault, oppose, or resist, any of the officers of the customs of excise, in the seizing of any such goods ; or shall pass any note of the Bank of England knowing it to be forged.\* To these may be added about two hundred other crimes of different complexions, while great additions are made to this awful catalogue every fresh session of Parliament ; and the remark of the mild and learned Judge, Sir Michael Foster, may be applied now even with more force than when he made it : “ The learning touching those subjects is a matter of great and universal concernment. It merits, for reasons too obvious to be enlarged on, the attention of every man living. For no rank, no elevation in life, and, let me add, no conduct how circumspect soever, ought to tempt a reasonable man to conclude, that these inquiries do not, nor possibly can, concern him.”†

I will not detain the reader any longer in

\* See Note (G) Appendix.—† Foster's Crown Law, Pref. p. xviii. 2d. ed.

the recapitulation of the criminal statutes; for though it would not be difficult to overwhelm him with tales of horror, which would enable an expert writer to lead his assent by a hair, I am more anxious to convince his understanding than to inflame his imagination. If, however, he is not familiar with the subject, I will venture to recommend, as deserving his attention, the "Principles of the Penal Law," by Mr. Eden, afterwards Lord Auckland; and, if he wishes to pursue the question still farther, and to collect the multifarious opinions of authors, he will be furnished with an ample supply in a compendious form, in Montague's "Opinions of Different Authors upon the Punishment of Death," in 3 vols. 8vo. Nor will I seize the present opportunity, though perhaps not unfitting, to go back to the primitive institutions of mankind in order to deduce chronologically from them the practices of this age. It would require no great effort to spin a plausible theory adapted to the views which are brought forward in these pages; but I have less faith in such productions, than Adam Smith acknowledges himself to have had, respecting "political arithmetic;" and am apt to think the less we appeal to the civil institutions of mankind,

while they are in a rude state, the less likely we are to be lost in vague and chimerical speculations. Indeed it is the study of man, independent of institutions, that has led to the most consolatory conclusions.

It is apparent from the foregoing references to the criminal laws of other countries, as well as our own, that judicial punishments have not had simply for their object defence; but that they have mixed up with this a retribution of evil for evil, and have had regard to its exemplary effects. The early legislators were guided by the same feelings in their public capacity, as they were in their private one; and, in determining on punishments to be awarded by the state, they adopted those, which were consonant with the passion of revenge as manifested on the occasion of a private injury. Indeed we have no other natural criterion (and vague enough it is) for measuring the relation between crime and punishment than the indignation which it excites in virtuous bosoms; and it scarcely admits of contradiction, that the legislation of any given period will be merciless or mild, as the vindictive passions of legislators are found to prevail, or are subjected to reason. If their direct object had been only to restrain one from injuring another,

without any regard to other injuries of a similar nature, which had been, or might be, committed, there would be no need of treating the crime in any other way than as connected with its own evil.

Instead of this, crimes are punished, not so much with regard to the particular nature of each, as to the relation they have to evil in the abstract. Thus they are spoken of as being more heinous, because they are offences against society. By this explication, every offence, however trifling, becomes a highly aggravated crime, and must be punished with the utmost rigour. That which in itself, as between one member of society and another, was a venial occurrence, by this view becomes magnified ; and must be treated, not according to its real, but its distorted, magnitude. The error, I apprehend, is to be traced chiefly to the indulgence of a misguided passion ; and then to the confusion that exists in applying the abstract terms.

If punishment can be inflicted by the civil power, it cannot be from any *new* authority it possesses, distinct from what exists among the individuals whom it represents, or by

whom it is delegated ; nor is that authority increased by passing into other hands. It is expedient, and evidently consistent with the nature of a body politic, that, instead of every man avenging his own injuries, he should submit to the decision of a third party, wholly disinterested in the disputed transaction, and therefore less likely to be misled than the prejudiced man who is judge in his own cause. This is so perfectly reasonable, that some sort of judicial tribunal exists in every state of society. But the party, thus acting as judge between the two, acquires no function by which he can go farther than the disputants themselves, much less is he enabled to supersede the established laws of nature. The subordinate regulations, by which the Courts of Law are governed ; and which do not involve any important principles, are matters merely conventional, and may be established or recalled as shall be found most convenient by those interested.

I cannot but regard then the maxim of Beccaria, so highly appreciated by Blackstone, that “ Crimes are only to be measured by the injury done to Society,” as erroneous in the extreme. Legislators have been estimating them after this rate, and the conse-

quence has been, that almost every offence has been made capital. The fact is, that crimes are not capable of being measured by any standard adapted to the properties of matter; and the words and phrases we employ, to express such admeasurement, deceive us, if we imagine such a gross relation. How utterly inconsistent then is the attempt to apportion a chronical or acute pain so as to have regard to the injury done to society. No distinction is made between crimes of the blackest dye, and others of a venial kind; and we are constantly witnessing the solemn farce of hearing the sentence of death passed upon shop-lifters and murderers in the same breath, and thus the broadest distinctions of guilt are confounded, and the criminals themselves are impressed with the idea, that the sentence of the law has nothing to do with the turpitude of the crime. The infliction of death must be admitted to be an awful method of disposing of the difficulties of the question.

*Nec vincet ratio hoo, tantundem ut peccet idemq.  
Qui teneros caules alieni frerent horti,  
Et qui nocturnus Diyum sacra legerit.*

In a former chapter it was argued, and I

hope not without effect, that punishment considered as a retribution for evil, is an improper end for individuals to aim at in resenting injuries; and that the only proper end, which reason and virtue sanction, is defence and protection. The same reasoning may be employed in this place to shew, that retributive punishment, or as it is sometimes called, the satisfaction of justice, is equally irrational when it is the object of judicial sentences. The temptation being less, from the absence of self-interest, the punishment of the law is indeed less justifiable, than that which comes from the hands of an injured man, who may be supposed, upon a sudden attack on his person, character, or property, to lose some of that self-command which usually guides him; and, being instigated by the just indignation he feels, to go somewhat farther than in his cooler moments he would approve. The administrators of the law, being under no such impulse, ought to be guided (and indeed usually are so) by that dispassionate estimate of things, which will set them far above the gross and grovelling idea of a vindictive return, or of apportioning suffering to moral guilt by a haberdashery species of measurement. Though this inconsistency is seen by most modern writers on the law,

there are still some vague notions afloat very analogous to it, and which seem to me to incumber the subject nearly as much as the error they have relinquished.

It was a favourite idea of the Marquis Beccaria, that there was wanting in the penal codes of all nations, a fixed proportion between crimes and punishments ; not that the crime should be aggravated by the greatness of the sin, but by the injury done to society. This opinion, which strikes at the root of the principles laid down in these pages, has since been greatly enlarged upon by Mr. Bentham in his two celebrated performances published by M. Dumont, "Principes de Legislation," and "Theorie des Peines et des Recompenses," both of which contain a fund of intellectual wealth, buried under so much verbal lumber, that few persons will take the pains necessary to possess themselves of it.

"Les peines," says Mr. Bentham, "ont leur *maximum* et leur *minimum*. Il y a des raisons pour ne pas faire *moins*, comme pour ne pas faire *plus* ; ce sont les deux côtés de la question auxquels il importe de donner une attention égale.

“ I. Il faut que le mal de la peine surpassé le profit du délit.

“ II. Quand l’acte est de nature à fournir une preuve concluante d’une habitude, il faut que la peine soit assez forte pour excéder non seulement le profit du délit individuel, mais encore de les délit semblables, qu’en peut supposer avoir été commis impunément par le même délinquant.

“ III. La peine doit excéder le profit du délit au point de compenser ce qui lui manque (à la peine) en fait de certitude et de proximité.

“ IV. Si deux ou plusieurs délit sont en concurrence, le plus nuisible doit être soumis à une peine plus forte, afin que le délinquant ait un motif pour s’arrêter au moins.

“ V. Plus un délit est nuisible, plus on peut hasarder une grande peine pour la chance de le prévenir.

“ VI. La même peine ne doit pas être infligée pour le même délit à tous les délinquants sans exceptions. Il faut avoir égard

aux circonstances qui influent sur la sensibilité.”\*

No difference of opinion can possibly arise as to the propriety of proportioning, in the best way we can, the punishment or penalty to the crime; and the only point upon which we disagree, is, as to the qualities and properties of offences by which we are best enabled to deal out the degree of infliction which is proper, whether it be restrictive or positively afflictive. The author just quoted and Blackstone agree, that the injury to society is the quality in the offence which is to determine the quantity of the punishment; and the rules here laid down, which are at the foundation of Mr. Bentham’s system, more fully explain the principle. They involve some important considerations, which ought to be deliberately weighed.

In the first place, they are too artificial in their construction; and are diametrically opposed to that political system, which would conform to the natural constitution of things, and which regards the business of legisla-

\* *Théorie des Peines et des Récompenses*, Tom. 1. p. 21. et seq.

tion, not so much to make laws, as to expound those already in existence.

In the next place, the moral character of the offence is too much disregarded, the measure of punishment being to be determined by the prospect of advantage to the delinquent, and by the strength of temptation to which he is exposed. The injury done, or intended to be done, to the individual, which we have all along determined to be the only justification of his resentment, does not enter into the estimate by which the law would determine its sentence. Thus, as men sink in ignorance, punishment would be increased upon them ; and the conventional offences, created by society, would be visited with the same penalties as those which are vicious in their very nature. Surely these rules take for their guide a more uncertain relation between punishment and crime than is adopted already ; for, if there be any means of ascertaining that relation, it is safer to trust to the moral character of the transgression, than it is to rules so completely artificial, or to the profit it may be to the transgressor. Such distinctions put upon an equality an infraction of the Excise Law and of the Law of Nature.

The offender, who is hoping to gain by the smuggling of tobacco, is treated like another, who robs an innocent person on the highway.

Crimes and punishments thus become the object of "moral arithmetic," for should the profit of the delinquent greatly exceed the loss of the injured person, the penalty to be awarded will be great; or, as Mr. Bentham would put it, if the pleasures of the one should greatly overbalance the pains of the other, the punishment would be in like proportion. By a parity of reasoning, if the pleasures of the aggressor and the pains of the aggrieved should be equal, the account between them would be balanced; and if it should be found, as no doubt it sometimes is, that the pleasure and profit anticipated by a criminal are far less than the pain inflicted by him, there would absolutely be a balance in his favour!

But pleasures and pains are not fit objects of arithmetical calculation, and if reduced to so gross a treatment, the pains are in effect very similar to revengeful penalties, since such a mode takes for its guide so vague a criterion, as in effect to be no guide at all.

trate; punishment is the inspirer of terror; punishment is the nourisher of the subjects; punishment is the defender from calamity; punishment is the guardian of those that sleep; punishment, with a black aspect and red eye, terrifies the guilty."\* The *lex talionis* is the most striking analogy that can be pointed out; and this was a leading feature of the Mosaic law, and "an eye for an eye, and a tooth for a tooth" was a proverbial expression. It is also the leading principle of Mahomedan penal law. "You will find," says the Koran, "in this law, and in the fear which it inspires, the best security of your life." One of the laws of the twelve tables was, *Si membrum rupsit, ni cum eo pacit, talio esto.* By the ancient law of England, he that maimed any man, whereby he lost any part of his body, the delinquent should lose the like part, as he that took away another man's life should lose his own.† By the 37 Edward III. c. 18. such as preferred any suggestion to the King's great Council should put in sureties of taliation; that is, incur the same pains that the other should have had, in case the suggestion were found untrue.‡

\* Robertson's India, p. 218.—† 3. Coke's Inst. 118.—‡ 4. Blackstone's Com. 14.

The gradual disuse of analogical punishments among modern nations, and their almost total abandonment among ourselves, proves their unsuitableness ; and indeed, if carried to the extent approved of by some writers, they are in many instances so coarse, and in others so ludicrous, that their effects instead of exciting indignation in the beholders, would frequently raise their pity or their laughter.

“ Pour établir de l'analogie entre la peine et le délit, il faut qu'il y ait dans le délit quelque circonstance frappante qu'on puisse transférer dans la peine.

Cette circonstance frappante ou caractéristique sera l'instrument qui sert au crime ; l'organe qui le consomme ; la partie du corps qui a été le sujet du délit ; le moyen employé par le délinquant pour n'être pas reconnu, etc.”\*

Thus, the incendiary, who had sacrificed life as well as property, he would have punished by burning ; corporeal injuries by the infliction of similar ones ; the poisoner by

\* Théorie des Peines et des Recompenses, Tom. 1. p. 50.

poisoning, and if he has not succeeded in killing the person whose life he attempted, let an antidote be administered to the delinquent before the dose has taken effect. This philosopher, so humane in general, thus expounds the punishment by fire, when the case is aggravated. “ *Le feu pourroit être employé comme instrument de supplice sans aller jusqu'à la mort. La peine est variable dans sa nature entre tous les degrés de sévérité dont on peut avoir besoin. Il faudroit soigneusement déterminer dans le texte de la loi, la partie du corps qui doit être exposée à l'action du feu, le mode de l'opération par une lampe, le nombre des minutes, et l'appareil nécessaire pour ajouter à la terreur. Pour rendu la description plus frappante, objet principal, il faudroit y joindre une estampe où l'operation seroit représentée.* ”\*

I stated before, that the rules laid down would authorise any cruelties and torment; and here we find the author undisguisedly giving them a practical application: or, if not, the exemplification must be allowed to be the most unhappy that could have been selected. That principle must be very indis-

\* *Theorie des Peines, &c. Tom. I. p. 53.*

tinct, or very bad, which leads to such consequences. By the establishment of religious and political liberty these cruelties have been once blotted from our code, and the intellect, both of government and people, is too much enlightened ever to suffer them, or principles which lead to them, to be again established. Mr. Bentham's theory of punishments—and I do not form my opinion from insulated extracts—is calculated to establish a more complicated system of legislation than has yet prevailed, and instead of leading us from our present difficulties towards simplicity, would carry us back to still greater fluctuations of opinion and of practice.

One of his examples of analogical punishment is so facetiously selected, that it will serve to divert the reader's thoughts into a happier channel, than they have been left in by the last extract.

At Amsterdam they have a house of correction where vagrant and idle persons are sent. Among the different employments, there is one which consists of working a pump, so that if the lazy labourer relaxes for a moment, the water gains upon him, and he

is in danger of being drowned. This, it must be confessed, is a most ingenious device to rouse the latent industry.

If any thing more be wanting to shew the incongruity of punishment, as a retributive return for crime, when employed by fallible men, the following quotation from Dr. Paley, will be seasonably presented to the reader's attention.

“From the justice of God we are taught to look for a gradation of punishment, exactly proportioned to the guilt of the offender; when therefore, in assigning the degrees of human punishment, we introduce considerations distinct from that guilt, and a proportion so varied by external circumstances, that equal crimes frequently undergo unequal punishments, or the less crime the greater; it is natural to demand the reason why a different measure of punishment should be expected from God, and observed by man; why that rule, which befits the absolute and perfect justice of the Deity, should not be the rule which ought to be pursued and imitated by human laws. The solution of this difficulty must be sought for in those peculiar attributes of the divine nature, which

distinguish the dispensations of supreme wisdom from the proceedings of human judicature. A being, whose knowledge penetrates every concealment, from the operation of whose will no art or flight can escape, and in whose hands punishment is sure: such a Being may conduct the moral government of his creatures, in the best and wisest manner, by pronouncing a law that every crime shall finally receive a punishment proportioned to the guilt it contains, abstracted from any foreign consideration whatever; and may testify his veracity to the spectators of his judgments, by carrying this law into strict execution."\* Sir William Blackstone and Mr. Gisborne, the opponent of Dr. Paley, coincide in the opinions contained in this extract. And yet I am at a loss to reconcile numerous passages in all these authors, where these views seem to me to be contradicted, since they evidently countenance retributive punishment as awarded by individuals, and many kinds of legislative penalty which are as strongly characterized by the same feature of retribution.

\* Paley's Moral and Political Philosophy, b. vi. c. 9. See also Note (H) Appendix.

It is a satisfaction, however, that our most popular writers have abandoned the principle of retributive punishment as unfit to be adopted in the penal code; for though they have followed different paths, they have all arrived at the same conclusion on this point.—Beccaria, Blackstone, Tucker (the author of the “Light of Nature”), Paley, Lord Kaines, Bentham, and Romilly, have reached it by taking the high-road of political expediency; Mr. Gisborne has been guided chiefly by the light of the Gospel; while I have sought it in a less frequented way, by reasoning *a priori* from the constitution of human nature, and have had as my precursors such men as Butler, and Balguy, and Adam Smith, and Price, and Stewart. To these illustrious names it would be unpardonable not to add that of Sir James Macintosh, whose successful experiment in India is evidently grounded on the same conclusion. But the indistinct notions, (and I hope I shall be pardoned for the expression,) which some of these admirable men entertained on the subject, have driven them into another doctrine, which is confessedly a step in advance; but which, if examined thoroughly, will not, in my humble view, be much more satisfactory.

Nor can I believe that we shall ever make any progress in the science of criminal jurisprudence, until we are agreed as to the fundamental principles on which it ought to proceed. Experience alone will never teach them, unless assisted by the study of their abstract nature. The *end* of punishment, which is here to be briefly examined, is absolutely essential to the inquiry.

“The end or final cause of human punishment,” says Blackstone, “is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the supreme Being: but as a precaution against future offences of the same kind.”—“The proper end of human punishment,” echoes Paley, “is not the satisfaction of justice, but the prevention of crimes. By the satisfaction of justice, I mean the retribution of so much pain, for so much guilt; which is the dispensation we expect at the hand of God, and which we are accustomed to consider as the order of things, that perfect justice dictates and requires. In what sense, or whether, with truth, in any sense, justice may be said to demand the punishment of offenders, I do not now inquire; but I assert, that this *demand* is not the motive or

occasion of human punishment. What would it be to the magistrate, that offences went altogether unpunished, if the impunity of the offenders were followed by no danger or prejudice to the commonwealth? The fear lest the escape of the criminal should encourage him, or others, by his example, to repeat the same crime, or to commit different crimes, is the sole consideration which authorises the infliction of punishment by human laws.

“ Now that, whatever it be, which is the cause and end of the punishment, ought undoubtedly to regulate the measure of its severity. But this cause appears to be founded, not in the guilt of the offender, but in the necessity of preventing the repetition of the offence: and from hence results the reason, that crimes are not by any government punished in proportion to their guilt, nor, in all cases, ought to be so, but in proportion to the difficulty and the necessity of preventing them.”\*

The doctrine of punishing delinquents, in order to prevent the recurrence of crimes, has grown out of the ruins of the other, which in-

\* *Moral and Political Philosophy*, Vol. II. B. 6, c. 9, and *paseim*.

sisted, that punishment was a just return for evil. If we exclude from our consideration the latter view, punishment for the prevention of crimes may either mean, that it is inflicted with reference to a particular crime, or to crimes generally. If it is understood in the former sense, the dispute is very much narrowed, and will be chiefly confined to the difference of employing it to prevent crimes, or to prevent injuries ; but it is not so understood by all the writers, whose opinions we have to examine. In order to accomplish so important an end, the means they would employ are such as are considered to be efficacious to deter others, and to amend the character of the delinquent.

The infliction of punishment, by way of example, is, without doubt, the principal object which legislators have had in view ; but it appears to me to be justified on such very suspicious grounds, that its validity, without presumption, may be fairly questioned.

In the first place, I cannot conceive by what authority the state acquires such an absolute control over the life, and liberty, and property, of every individual, as for these reasoners to insist, that it has a right, for offences

of every magnitude, to take away, or dispose of those original rights, essential to the end proposed by the Creator, in bringing us into existence.\* If all the essential properties of our nature are to be at the disposal of an arbitrary power, independent of ourselves, as this position unquestionably assumes, mankind are no longer accountable beings ; the relation between their principles and their actions is effaced ; and it would appear, that should a legislature fancy the most preposterous arrangements, as necessary to the well-being of society, it need not consider the essential attributes of human nature, but might dispose of political and moral events, as if all of them were accidental, and under the complete control of statesmen and their laws,

It is no answer to this to say, that men are bound by laws which they make for themselves; and that what is the *general will* of society, ought to be the rule of conduct for every individual of which that society is composed. The fact is, that men are not bound by their own laws, as such, or those of their representatives, or by any original compact;

\* I assume here, for convenience sake, that that end is the exercise of the various powers of reason and virtue, with which we are endowed.

but they are bound by what is of higher authority—reason and virtue. These are to be discovered by studying the laws of the Deity, already promulgated in his revelation; or to be learnt from that order of succession in physical and moral events, which is constantly pressing itself upon our attention, and from which, unconsciously, we are daily resolving particular truths into those which are more general. Directed by such a light, the law will not be an arbitrary and fluctuating rule, to-day making forgery a capital offence, and to-morrow dwindling it down to a misdemeanour; and the relation between crimes and punishments will not arise out of a fictitious state of society, or out of the varying fashions of opinion, but it will be as immutable as the principles on which truth rests.

If there exists any right in the state, and such an one unquestionably does exist, of restraining offenders from committing injuries, it must spring out of some relation between the aggression, which gives that right, and the penal infliction, which is the exercise of it. But punishment, when it is employed to deter others, steps out of this province, and is no longer supported by the relation between the offence and the penalty. It appor-

tions to one what may, or may not, be the desert of another. It inflicts upon a criminal a measure of suffering, not with regard to his own crime, but in proportion to the obduracy of other criminals ; to the strength of temptation to which they are exposed ; and to the artificial and involved state of society, in which they may happen to live. The justification that is offered, appears to me to be most preposterous. “ *Crime*,” say the advocates of exemplary punishment, “ *must be prevented by some means or other ; and, consequently, whatever means appear necessary to this end, whether they be proportional to the guilt of the criminal or not, are adopted rightly, because they are adopted upon the principle which alone justifies the infliction of punishment at all.* ”\* What is this but saying, that any means, however arbitrary ; any cruelties, however inordinate, may be employed to suppress crime, if it cannot be done without ? If such principles prevailed in the legislature, and were infused into a new penal code, we might anticipate the return of the age when “ tender mercies are cruelty.”

But why should we resort, in criminal le-

\* *Moral and Political Philosophy, B. vi. c. 9.*

gislation, to principles which are no longer the guide of politicians in other departments of the social polity? The laws affecting commerce, the currency, the price of corn, coal, and every thing else, used to be considered as mere regulations of power, without any regard to the necessary relation of things. The same unnatural attempts have been made to control mens' actions in other parts of the social connexion, as have been made with reference to criminal conduct. We have at length discovered, that in the ordinary transactions of life, such attempts to dispose of them, are always ineffectual, and most frequently absurd. All that is wanted to promote the interest of society, is to give the individuals of it the utmost freedom of action, and never to interfere, but when one man would encroach upon the just freedom which is the right of another. It is by leaving men to be controlled as much as possible by the laws of nature, under the wise and salutary restraints of a mild government, that we shall discover the best means of governing them; not by a perpetual interference on slight occasions, or by destroying those natural relations of cause and effect in the political and moral world, which are as evidently to be discovered as in the physical world.

Besides, if no other reason can be given, than that the thing *must* be done, where do we discover, in the rational or irrational world, the necessity of such a procedure? Does revelation any where command us to use all and every means to suppress vice? Or is there any part of God's government which, by analogy, would lead us to such a conclusion? Certainly not. The fact is, that the very reverse of all this is the case. We are required not to do evil, that good may come; and the whole scheme of Providence, as exhibited in his creation, and in the constitution of man, distinctly declares, that though good and evil subsist together in the world, and the latter may sometimes overcome the former, yet cause and effect are so wisely ordered, that virtue in the end will prevail over vice; and we may safely forego any temporary advantage to be obtained, by employing suspicious means to advance the cause of virtue; or, by carrying into practice those vague notions, which make *necessity* the rule for determining on a political measure. It is the most uncertain rule that can be employed, since it often means nothing more, than that a reason cannot be found for our conduct.

Let it be recollected, that exemplary pu-

nishment, to be efficacious, ought to affect the principles, or motives, of mens' minds; and if it does not do this, it does worse than nothing. It inflicts suffering upon human creatures, greatly beyond their demerit, without any advantage but what is imaginary. Actions are but the evidences of mens' principles, and are not, *properly* speaking, objects of correction or reformation. It is the springs from which they have arisen, that must be cut off, if we would change their character. Now such is the nature of law, that it is not directly adapted, except in the most imperfect manner, to govern and dispose of the motives of mens' actions; but can only restrain the actions themselves. It is justly defined to be "a ruler of action." Hence arises the disappointment we experience, of the inefficacy of exemplary punishment.

Besides, it is to be suspected, that certain criminals undergo the severest punishments, merely because our technical rules of law, or our interest and skill in constructing verbal distinctions, have enabled us to reach the offences they have committed, while a thousand other evils, of a similar kind, elude the dexterity of the legislative art. Thus the vo-

luminous statutes relating to game, are so ingeniously devised, and are administered so summarily, that an offender, upon the slightest evidence, is hedged in on every side, and must be attended by an unusual degree of good fortune, if he can escape. On the other hand, cruelty to animals has never yet been legislated on, and when attempted, the proposition, perhaps wisely, has been rejected, from the want of an established and recognized principle in the law bearing upon it. Thus it is, that one class of crimes may be pursued to the utmost extremity of suffering; while we are left only to sorrow and weep over another class, equally injurious, but not within the reach of our artificial rules.

The truth is, the necessity of preventing crimes has been the plea, in all ages, for the cruel punishments which have been practised. Terror and intimidation have been employed by the state as specifics to cure moral disease; and there is no closer alliance in medicine, between Jesuits' bark and intermit-tents, than there has been in politics, between exemplary punishment and delinquency.

Necessity, says the proverb, has no other law to guide it, but its own; and the ill-go-

verned passions of mankind have been too ready to fall in with this accommodating doctrine. It is also too commonly imagined, that the legislature can do every thing for us ; and as soon as any irregularity or evil appears, we clamour for an Act of Parliament to suppress it, instead of every man doing all in his power silently to correct it. We conduct ourselves, as if it were of more consequence to put down a solitary evil action, than to correct the principles of the mind, from whence all actions of the same nature arise.\*

On this point, of preventing crimes as the end of punishment, I have the misfortune to differ with many writers on the subject, and with the practice generally adopted in the execution of our law. It is impossible to anticipate the arguments which could be employed to support the question, since it has been by all, as far as my knowledge extends, laconically dismissed, under the omnipotent argument of necessity. I am not, however, totally deserted, as I have the happiness to find an able supporter in Mr. Gisborne, whose views of the subject are generally coincident with my own.

\* See Note (I) Appendix.

“ Of all the unfounded notions respecting punishment,” says this perspicuous author, “ no one is so prevalent as the idea, that natural justice, independently of political institutions, authorises the infliction of it on criminals, for the purpose of deterring others from becoming so. The assertion of a right to punish, on this ground, is directly repugnant to the principles already established; and, indeed, is never supported by any thing which has even the semblance of solid argument. The source of the error appears to have been the want of discriminating between the right of inflicting punishment, and another right totally distinct from it, namely, that of selecting one particular *mode* of punishment, rather than another. No man can be *justly* punished for the *purpose* of deterring others from offending: for that would be to punish him, not for his own fault, (the only ground on which the justice of human punishment can originally be rested,) but either for no man’s fault, or for that of others.”\*

It would appear, from these arguments against exemplary punishment, that it is not to be justified either by revelation or reason,

\* *Gisborne’s Moral Philosophy*, p. 187.

as the chief end, though it may be a subordinate end, of the penal law. Like retributive punishment, it is exceedingly vague, and apt to lead mankind to employ cruel and tormenting pains, and to harden their hearts. It confounds also every degree of crime together, and punishes with the same severity heinous and venial offences. It prevents the exercise of mercy in a just manner; since the sovereign authority, which is the repository of it, is not left simply to consider the merit or demerit of the offender, which is the essence of moral judgment; but it must also consider the delinquency, and the temptation of others: and thus it must mete out justice by the cold and irresponsible hand of the law, and not by the virtue of the mind. The effect of exemplary punishment upon the culprit is also unfavourable. It raises in his mind a sense of injustice, and that he is sacrificed for the sins of others, not for his own. Instead, therefore, of filling him with repentance and remorse, which would be the natural consequence of a sentence proportioned to his individual guilt, his spirit rises in resistance against the vengeance taken upon him; and if he suffers quietly, it is in the sullenness of despair, and not in the sorrow of a contrite heart. This we find to be the na-

tural course of things in cases where we take the law, as the phrase is, into our own hands. As long as we only make the assailant suffer a penalty proportioned to his aggression, nature silences his anger, and he is an unresisting sufferer filled with shame; but, if we exceed the just measure of severity, his anger rises in return, and his wrong becomes opposed to our wrong. This constitution of our nature was treated of in a former chapter, with reference to injury and resentment; and it appears, from the unanimous evidence of all practical men, to be equally conspicuous among those who suffer the punishment of the law.

What then is the right end at which the law should aim? This is the point now to be considered.

The criminal jurisdiction we claim, is founded upon those principles by which we acquire the right of defending ourselves, and others connected with us, from wrong and injury; and upon others which inculcate the duty of reforming the wicked, and reclaiming them from the paths of vice. We say, that, if this ground be taken, we shall escape many of the inconveniences to which we are other-

wise exposed; and shall fall in with those benevolent sentiments, which are the strongest evidences of a determination in favour of virtue. Besides this, our views will correspond with those important doctrines of political economy, which I have before pointed out to be essential to successful jurisprudence. The administration of the criminal law will not then contradict or destroy our natural rights; but the exercise of them will merely be transferred to a third party, to be used by him with that conscientious regard to rectitude, which his disinterested situation enables him to employ. No new right, or greater power, is conferred upon the arbitrator, than was possessed by the aggrieved persons; and he only stands in their place, in order to give a free exercise to the reason and moral judgment, which ought to govern them, and of which they would approve, but for the peculiar circumstances of their situation. This appears to be the rational foundation of courts of judicature.

It is in this way that the sovereign authority, and the laws, are pre-eminently advantageous; and all mankind, from the earliest records, have possessed some judicial tribunals, independent of the aggrieved parties.

Even the decision of a despot, if he be no party to the dispute, is more likely to be consistent with justice, than the wrangling of the interested persons would be, where justice is set at defiance, and the worst of the malignant passions prevail. If this be the case in a rude state of society, how much more beneficial must the administration of justice be, when the authority is not arbitrary: and when the moral obligations are not only well established, but are every day making additions to their strength!

It has been shewn before, that a right of self-defence, and of the defence of others, is a part of the constitution of our nature; and that we are not only authorized, but are enjoined, to protect the gifts with which we are entrusted by our Creator; and, that a man would be wanting, both to society and to himself, if he should passively abandon his life and his property to the assailant, who should attack them. In exercising this right, we are also empowered to employ such means as are adequate to the purposes of defence; always recollecting, that it is not easy to make amends for the disproportion between the life of a man and a pecuniary loss.

The law is intended to remedy the abuses to which the constitution of our nature is liable; and in order to effect this, must never lose sight of the rational ends of that constitution. The prevention of crimes, or, which is the same thing, the prevalence of order and virtue, is the consequence of our attending to proximate duties; but it is not an object the law can properly propose for its immediate attainment. In resisting aggression, we do not aim at preventing crimes generally, nor even, in the first instance, of preventing the crime, as such, which we resist; but our immediate object is to defend ourselves, and repel the aggressor. If the prevention of crime were our immediate object, we should evidently employ very different means from those we use for our simple defence. Our right of defence, however, as it does not end in the mere repulse of the assailant, gives us also an authority to restrain him from committing future injuries. The injured person has not only a right to require indemnity for the past, in such things as admit of return, but also a security for the future. These are proper subjects for a judicial tribunal to decide upon, although they create the greatest difficulties. Time and study will probably remove some of these;

and in the mean time we may rest assured, that we shall act wisely to keep as closely as possible to the proximate duties and plain rights of mankind, without puzzling ourselves with such a vague and remote end, as is comprehended in the phrase—the prevention of crimes.

It has been stated, that it is the duty of virtuous men to reclaim the wicked; but it is evident, however obligatory this duty may be, that we are to use such means as are consistent with justice, and with benevolence. These virtues would certainly restrain us from employing any cruel measures; they would also prevent us from making the offender suffer condignly for the sake of example. This can never be the chief end, that we should keep in our view, though it is a subordinate end, and an effect that necessarily follows from the means which we employ. That all our punishments and penalties should be so constructed as to operate in an exemplary way, and should work a reformation in the mind of the offender, we are all agreed; and the question, which divides the friends of the old system and those of the new, seems to center here—Whether exemplary punishment, and the deterring of cri-

minals, should be the prime object of the law; or whether defence and reformation are not more intelligible and direct objects? There is, perhaps, another distinction to be made, which may even divide the reformists themselves; and that is, whether the reformation of offenders is so direct and appropriate an end for the legislature to aim at, as defence, and protection from violence and injury; and in what cases the one ought to be subordinate to the other.

I must confess myself disposed to conclude, that the amendment of the offender must always be subordinate to something else in the eye of the law. It never can be the chief end of judicial sentences, though it may always be made incidental; and every punishment must be deficient which does not constantly keep it in view. It is, I think, evident, that legislatures never have regarded it as the primary object, since they can only attempt to prevent such crimes as are injurious to society, and are obliged to pass by innumerable others of a more vicious character. If the reformation of the wicked had been their immediate and direct object, they would not have left the worst description of offences to be corrected by means over

which they have no immediate control. This end, therefore, though of the highest importance, must be treated by the law as a subordinate object, and never can become the principal one for which it is established.

But on this point I am not very fearful, because whatever means may justifiably be employed for so important a purpose as the renovation of the moral character, these means will never contradict the spirit of justice or of benevolence. It is unlike such vague ends as example, and prevention of crimes, which would lead to the practice of intolerable cruelties. The reformation of offenders is a limited object, and sufficiently well defined to prevent men from being guilty of wild excesses to attain it; and the practice of the present day, both as it regards prisons, and parental and scholastic discipline, is a sufficient guarantee that we never shall run into the absurdities which our ancestors were wont to do.

It is of the greatest importance to be aware, that whatever judicial punishments we employ, must be employed for a right end. No two things can well be more distinct, either in the means or the ends, than

exemplary punishment and self-defence. Exemplary punishment admits of the indulgence of the worst passions without any limit; while self-defence prescribes a limit, and is incompatible with bad passions. The virtuous man will not be satisfied, that he has repelled a delinquent, and saved himself, unless the feelings with which he has done it have been properly directed. It will be no consolation to him, that he has made a public example of a criminal; or, to use a familiar phrase, that he has paid him in his own kind: and he will be still more dissatisfied with himself, if he finds he has been acting from blind impulses, and has had no other view than the gratification of revenge, or hasty resentment. He will esteem this end as absolutely vicious.

Nor, again, will the man, who has regard to the sanctions of reason and conscience, be at all satisfied with himself, should he find, that he has been acting from some indistinct notions, derived from remote and obscure sources, and has not taken the pains to know whence they come, or to what they tend. Such a vacillatory state, which is but too frequent, he would esteem nearly as unsatisfactory as acting without proposing any end at

all. But, should he be able, upon deliberate reflection, to satisfy himself that he has had no other purpose in view, than the resistance of aggression, and the defence of himself and those about him,—that he has found no pleasure in the sufferings of his victim, and has inflicted nothing for the sake of example, he may then rest content, that his state of mind has been compatible with reason, and that he has acted upon the highest principles with which we, as rational creatures, are acquainted.

A similar distinction exists where the law proposes an end. If its object be a retributive reward for evil, in an excessive degree, and to operate by its severity to deter men from committing the like offence, it proposes what is inconsistent with mens' constitutions in their individual capacity; and therefore fails in accomplishing its object, and becomes an instrument of evil. If on the contrary, the law proposes the protection of those gifts with which we are entrusted by Providence, its execution will be disarmed of cruelty; evil will not be returned for evil; nor will any greater severity be employed than is necessary to attain the direct end. As this perfectly coincides with our constitu-

tion, and with the reason of things, and proceeds to no greater length than they require, the law becomes an auxiliary of virtuous purposes, and an important instrument of good.

Here it is proper to state another length to which these views will probably carry us, and which will still farther define the limits of legislative punishment.

If the prevention of injury, and not the avenging it, be the right on which we are authorized to inflict pain, and shed the blood of the aggressor, the injury, when submitted to another jurisdiction independent of the parties immediately interested, presents a very different aspect from what it did while in the act of committing, and the assailant was in the hands of the aggrieved person. During the perpetration of the crime, the principles we have laid down would justify us in employing such force as would be necessary to repel the aggressor, and prevent the injury ; always bearing in mind the consideration, whether the attainment of the end we propose is adequate to the hazard of life. We have admitted before, that there are cases, though of infrequent occurrence, where we might justly venture upon this extremity ;

but then we have seen also, that such a measure can be only justified by the impracticability of preventing the injury in any other way. It is a case where the choice is between yielding up our own life, and what is adequate to it, or that of those who are dependent on us ; or, taking that of another, who has voluntarily put himself into a situation to forfeit it. The extremity of the case alone justifies the procedure.

Criminal judicatures are never brought into such dilemmas. The difficulty never happens to them, but in the cases of murder and treason, and such heinous crimes, that they must take away life, or yield that of an innocent person. When a delinquent is secured, he is no longer capable of putting another upon such an issue ; and therefore the right that existed of taking life during the aggression, is suspended on account of the aggression being past. What then is our remedy ?—Clearly this : That we have a right to restrain the offender in such a manner as shall prevent him from committing the same injury, and others of the like kind ; and it is just also to require compensation from him for the loss of any thing that admits of such return.

The punishment of death for murder, treason, piracy, rape, and such heinous offences, rests upon the same right of defence. The means we employ for our protection must be adequate to the purpose ; and such is the confirmed depravity manifested in these crimes, that, hitherto, mankind have not considered themselves as safe, unless the murderer's life was taken. Perpetual incarceration does not even seem to be a sufficient security against such villainy : prison walls have been thought but a slight barrier against him who prowls at midnight, and, not satisfied with despoiling his victim, gluts his malignity by shedding his blood. To prevent the murderer from the possibility of repeating his crime, mankind, from the earliest records, have universally agreed to take the life which he has forfeited. Any thing short of this is considered as an inadequate preventive. Whether the time will ever arrive when it will not be necessary to resort to this desperate remedy, need not here be discussed. The general feeling of mankind is, that that time is not yet arrived.

The adoption of this principle of defence restricts the punishment of death to the fewest possible cases. It also draws a more defi-

nite line about corporeal punishments; and entirely discountenances some, such as dismembering, by cutting off the hands or ears, slitting the nostrils, and whipping; and also ignominious penalties, such as the pillory, the stocks, and the ducking-stool. The sentence of death would be passed only upon those who were intended for execution; and the executed certainly would not be pilferers or forgerers. Whatever aggravation might attend their case, it never could be shewn to be necessary for self-defence to shed the blood of him who should pass forged bank-notes, or infringe the Revenue laws; and it would be equally inconsistent, with such a principle, to carry into effect that barbarous part of the sentence for high-treason, which attempts to load the criminal with posthumous ignominy, and by this means to strike terror into the hearts of the spectators.

It is no small satisfaction, that we have nearly, though not altogether, arrived at a practice corresponding with this view; though we have not yet adopted the principle. The benevolent feelings of mankind have prevented them from carrying into effect the barbarous code of our ancestors; though it is probable the greater part have acted upon

their instinct, without taking much pains to ascertain the reasonableness of their conduct. The same feelings are propelling society forwards to some other conclusions which I have drawn ; and it is no extraordinary gift of prescience to foretell, that it will not be long before capital punishments will, in practice, be entirely done away with, for all offences short of the most atrocious. Why will not legislators then be beforehand with the public, in abolishing what is so abhorrent to virtuous and just feeling ? Why will they procrastinate, until they are schooled into the measure by the indignation of the multitude ? There are some cases, perhaps, where it is prudent for legislators to follow, rather than lead, the public opinion ; but I am persuaded, that this is one in which they would find their advantage in being beforehand with their constituents, that the prudence of the few may give a right direction to the zeal of the many ; and by thus anticipating the public demands, they may prevent them from rising higher than their just and natural level.

Although the adoption of the principle of defence would do away the most repugnant species of punishment, it would still leave in

the fullest operation various others, and especially imprisonment in all its degrees, which is the species generally adopted in this country; and there is certainly no legislative punishment capable of such a diversified application, or which, upon the whole, possesses so many advantages, with so few disadvantages to counteract them: or, in the language of Mr. Bentham, where the *profits* are so sure, and the *expenses* so few,

The first recommendation of imprisonment, as an instrument of justice, is, that it effectually restrains the criminal from repeating the injury, which is the cause of his restraint, or others of a similar kind. Another is, that it is capable of being awarded in such various ways, as to enable the administrators of the law to deal out judicial penalties with some reference to the criminality of the delinquent; an advantage not to be had in capital punishments, which evidently exclude degrees. Not that it is intended to convey the idea, that punishment can be proportioned to the offence; but, that as the sentence must have regard to it, we are enabled by this species of penalty to take the best guide we have, which is the quantity and malignity of the injury intended. No

doubt the true moral principle is to secure the offender, as long as he contemplates doing injury; but how is it practicable to determine upon this prospectively? How can months and years of detention be proportioned to degrees of moral guilt and *malice prepense*? As this cannot possibly be effected, we must approximate to it, as nearly as we can, by adopting such penalties as admit of remission and divisibility.

Imprisonment recommends itself as not only possessing these important qualities, but as capable of being made exemplary, and conducive to reformation. It is the best adapted, also, to enable the criminal to make a compensation for the injury done; and to support himself without burdening innocent persons with expense. Nor is it of trifling importance, that this system falls in with the popular sentiments, and therefore is more likely to be beneficial to delinquents. When the sentence of the law violates the established feelings or prejudices of the community, it excites pity and commiseration for the sufferer; and he is not looked upon as an example of justice, but as a sacrifice to the harsh and conventional forms of society.

But prisons may also operate as afflictive punishments, if such should be thought expedient on account of the aggravation of the crime. Not only labour, which ought to be done by every prisoner, but *hard labour*, may be required. The diet may be deteriorated or diminished; solitary confinement may be inflicted; or the criminal may suffer in the want of the usual comforts and conveniences of the place. A thousand variations might be suggested, all of which would be consistent with the direct end, we have insisted on as necessary to be kept in view; and as tending to promote the subordinate ends of example and reformation. The three objects of punishment with regard to the offender, namely, *incapacitation*, *reformation*, and *intimidation*, would then be conformable to Mr. Bentham's ideas.

Such a system would prevent the disproportionate punishments that are awarded, at present, by different judges for the same offence, committed at the same time, and under the same circumstances; a consequence that arises from the dissimilar views they entertain, respecting the proper end they ought to aim at. The case of the two men, who robbed a poultry yard, within the Norfolk

circuit, is a striking illustration. My Lord Loughborough awarded a punishment in reference only to this single offence; while Mr. Justice Gould awarded his judgment in reference to all crimes of the like nature. Thus these two judges, both of them conscientious, were left to apply so different a remedy, because the ends they proposed were so totally unlike.\* If the principles here laid down are correct, this arbitrary authority will be reduced to narrower limits. A definite end will call for definite means; and punishment will not be inflicted for the same crime in the revolting disproportion, which it may be at present.

Let it be recollected also, that, though the direct object we propose to ourselves is defence and protection, this is not the only advantage we obtain. The pain that is the consequence, whether it be afflictive or restrictive, operates upon the mind of the delinquent, and of other offenders, to prevent that particular species of crime, and to deter mankind from crime generally. For though it is of the utmost importance in the practice of virtue, that we should have a chief end,

\* See Note (K) Appendix.

yet we are not precluded from other ends subservient to it; but, on the contrary, those act most consistently with their nature, whose objects, both principal and subordinate, correspond with, and support, each other; and there can be no doubt, if we are directed by enlightened views, that the secondary objects are more completely attained by this co-operation.

Thus, supposing the end to be aimed at in judicial punishments were defence, this is not the only good which would arise. The prevention of crime, the reformation of the offender, are consequences as certainly obtained by this means, as if exemplary punishment and reformation were the objects sought after. The effect on the mind of the offender will unquestionably be more favourable, if we lean to the side of mercy and beneficence, rather than of cruelty. Indeed, such a course of conduct keeps down that turbulent opposition of the offender, which arises in his mind when the punishment is too severe, and excites in him sorrow and remorse, which are the natural consequences of merciful treatment.

It is a truth which cannot too often be in-

sisted on, that the business of politicians is to attend to those direct ends, which are plainly within their management; and to leave the remote ends to be brought about by the operations of natural law. They will then, like the prudent physician, follow the course of nature, and not, like the empiric, attempt to subdue diseases by panaceas or specifics. But it is the less necessary to enlarge upon this very important point, as I should have to repeat what I have already said in considering of the ends, which individuals ought to propose to themselves in their actions.\*

One more observation, and I shall conclude this chapter. It must be admitted that the view which I have taken of the criminal law, supposes criminals not to have lost *all* sense of right and wrong. Nor is it possible to conceive such a change to have taken place, unless they were completely altered in their nature. The very preference they give is a proof that they have not totally lost the characteristics of human beings. The case is not that they are insensible to the distinctions between virtue and vice, but that,

\* Vid. p. 101.

having had the power of choosing, they have approved of the latter more than of the former. If their natures were changed, as some persons would treat them, I know not how we could legislate for them with any chance of success. At present, we are enabled to act upon the principle, that like causes produce like effects; but should the nature of delinquents be so altered, as to take them out of the common course of the human constitution, we should be left entirely at sea, and could never legislate upon any settled principles.

This is evidently not true of the majority of offenders, and more especially of those against whom it is most difficult to guard; and as to the extreme cases, which appear like exceptions, it would be unwise to frame a system accommodated to them, and thus unfit it for the usual constitution of mankind.

## CHAPTER V.

*Of the analogy between human and divine law—the Mosaic and Patriarchal dispensations—of judicial discretion, and the impossibility of making law to supply the place of virtue.*

IF the previous discussion was necessary, to lay open the sources to which we must apply for information on this most critical subject, we shall find it expedient, as we proceed, to advert to other obstacles in the way, which must be removed, before we can obtain free access to the knowledge we are seeking.

One of the chief of these is the close analogy that has been attempted to be preserved between the penal inflictions of human tribunals, and those of the Deity enjoined against sin. It is this idea of affinity that has swept into the same net,—to employ Paley's figure,—such a multitude of crimes of different dyes; and has visited with the same pu-

nishment the guilt of stealing five shillings privately from a shop, and the crime of parricide aggravated by the most malignant circumstances. This is the ground also, that has induced legislatures to mix up so much of the retributive character in all their punishments; and indeed to presume upon awarding punishments at all. They have imagined, that, as the divine nature could not but be displeased with the wicked, and was visiting them by punishments, or rather by pains, in this world, and denouncing his wrath against them in the world to come, they also in their character of governors would please God if they distributed justice, and avenged His cause, in the same way. But it will be found upon examination, that human law, established for the preservation of society, differs most essentially from the divine law in its sanctions and its ends.

In the first place I would remark, then, that the analogy can have no other application than to the laws and precepts, which have been delivered to us by revelation. For though in the language of modern science, we are in the habit of speaking of the established order in the succession of physical events as the *laws of nature*, this is evi-

dently in a metaphorical sense, as there can be no law without a verbal enunciation of it; and the use of such a phrase is sometimes rendered objectionable, as, when thus applied, it is apt to raise in our minds mean conceptions of the Deity, and to assimilate the Supreme Being to those mortals over whom He is the King of kings.

There is this wide difference existing between human and divine laws, as delivered to us in the Scriptures. The one has regard to actions; and the other to the motives of those actions. The moral precepts of revelation, are directed towards the government of the principles of our nature; from which, when established on a right foundation, a consistent course of conduct will follow. They admit therefore of being interpreted according to their spirit and not according to their letter. Human law, on the contrary, cannot with success take cognizance of motives, which are as various as the combination of circumstances can be, which forms the character of men; but it is obliged to direct its force against such actions as are capable of being brought within a verbal definition. Of the merit or demerit of these actions it judges by the consequences to so-

ciety, and does not look to their intrinsic value. This is so fallacious a criterion, that it is constantly hampering legislators in inextricable difficulties. They judge of the motive by the action, and not, as a perfect moral governor would do, of the action by the motive. This is an imperfection incident to all human law; nor can it be remedied, but by ascertaining the essential object of law, and by laying down our rules so as to have a view to the principle and not to the action. This is to be done only by a profound study of mankind, and by enlarging our rules as additional light shall enable us to do it. The philosophy of the material world proceeds more and more in this manner; and there is no reason why the philosophy of legislation should not advance by the same steps.

Another difference existing between the human and divine law, is to be discovered in the limited object which the former embraces; for while the one encompasses the whole human character in its individual as well as social state, and its virtues as well as its vices, the other only aims at suppressing such actions as are injurious to society, leaving out of its view much atrocious con-

duct, which is offensive to good morals; and not attempting, except in a very slight degree, to encourage and inculcate virtue. In looking back on the attempts which have been made at different times to enforce virtue absolutely by the assistance of the law, the retrospect is discouraging. I need only refer to the failure that has attended the statutes against blasphemy, profanity, sabbath-breaking, simony, intemperance, and usury: so impossible is it to force the understanding and the will into a given direction, even in the most reasonable matters; or to insist upon the mind's embracing any truth but by its own voluntary consent. The enforcement of charity, which has been regarded as the glory of our laws, must be classed in the same list, as nothing has more completely disappointed the benevolent, than the sumptuary laws established for the relief of the poor.

Again, the divine law of the New Testament never adverts to that species of action, which we have called *mala prohibita*; and which, as a branch of human law, surpasses all the rest in extent. Such are our Revenue, Game, and many of our Commercial Laws, with innumerable other statutes, the

infringement of which carries with it penal inflictions, that are too often confounded with those arising out of moral turpitude.

These prohibitory laws, deriving all their force from the conventional terms of society, give the greatest trouble to the statesman to enact; and when enacted, are constantly liable to be broken. This failure is no doubt chiefly to be attributed to their contravening the principles by which the constitution of man is necessarily governed. It is a maxim of law, that it derives all its sanctions from the laws of nature; but these laws against actions, not in themselves vicious, cannot, in most instances, claim this support; and depend, therefore, for being carried into effect, upon the strong arm of human power. Experience has taught us to our cost, the inefficacy of such a species of legislation, which has a tendency to multiply laws to an incredible number, and to introduce such complexity among the wheels of government, as no statesman, whatever talents he may possess, can possibly direct with satisfaction to himself, or benefit to others. This state of things has arisen chiefly from our ignorance of law as a science, and we have only followed the course of all nations, which in their

early history are too apt to rely upon temporary expedients ; and then, as they advance, find the utmost difficulty in supplanting institutions and practices, which have moulded themselves to their customs and habits. This obstacle, which to the bulk of mankind appears but trifling, modern statesmen have to contend with ; and such, in general, are the slow advances of knowledge, and so many impediments are always springing up, like Jason's dragon's teeth, before the man, who is not content with a superficial view, that to obliterate old institutions, without any experience of new ones, and thus to subvert the established opinions by which they were mainly supported, may reasonably make wise men tremble. To those who raise in their minds models of ideal excellence, and satisfy themselves of the efficacy of new establishments, by the faults of the old, no experience, however enlarged, no reasoning, however perspicuous, will ever appear worthy of the slightest attention.

The last remark to be made on the subject of the divine and human law is this ; that human law determines on actions by testimony that admits of degrees ;—the divine

law does not. This has essential truth for its object; which is supported by nothing that is compatible with degree. And though actual truth, or matter of fact, be the ultimate aim of human law, yet possibility, probability, moral certainty, and the gradations between them, is our utmost attainment in the science.

The use I would make of the foregoing observations, is to shew how very little the laws of man and those of revelation are alike; and the total want of analogy between the former, and those of the moral and physical world, excepting in the metaphorical phrase employed to express them. Another object I have in view, is to endeavour to throw down the fancied analogies of divine and human law, because they have been made the chief foundation of absolute authority, both by sovereigns and people. If a power derived from such a source can be established as the ultimate appeal in civil disputes; and legislators can arm themselves with vengeance, in order to retribute the infringement of the moral law, and thus claim to themselves the attributes of Deity, all that has been advanced by the numerous writers on political economy, to establish

the existence of a constitution in man producing order, independently of governments, is beating the air; and we may safely abandon the self-interests of mankind, as well as their virtues, to the wisdom and management of politicians, and not rest on the improvement aimed at by the individuals themselves. We are acquainted so little with the modes by which it has pleased God to govern men and things, that before we take upon ourselves the awful responsibility of directing the destinies of our fellow-creatures, we should at least have condescension enough not to become masters without first having been disciples; and thus arrogate to ourselves a knowledge of remote consequences in the political world at the time of our pupilage, when we scarcely are acquainted with the rudiments of political science.

We are living with a generation of philosophers who have performed prodigies, and who have reduced the elements of the material world from a countless number to another which is very inconsiderable—a circumstance that forbids us to despair of accomplishing any thing within the verge of possibility. The difficulty of establishing a written rule, propounding a course of action, con-

trary to, or impeding, the laws of nature, was never small; but as knowledge extends itself, and “ covers the earth, as waters cover the channels of the sea,” it will every day be more formidable. To attempt such a contravention, is ten times more trifling than it would be to regulate the commercial intercourse on the Exchange by the finical courtesy of a ball-room.

Connected with these remarks is the question respecting the authority of the Mosaic dispensation, and the patriarchal state, as a guide for christians. Seeing the opinion that so generally prevails in the present day, one cannot help being astonished at the confidence which was placed, till very lately, on the Hebrew economy as a prototype to be followed in all the essential matters of government. The old law books were filled with quotations from the Pentateuch; and Lord Coke's justification of the sentence for high-treason is a curiosity worthy the reader's attention, as affording a fair specimen of the mode of argument adopted by the learned on these subjects.

“ In the judgment for high-treason,” says this oracle of the law, “ is implied, *first*, the

forfeiture of all his (the delinquent's) manors, lands, tenements, and hereditaments, in fee-simple, or fee-tail of whomsoever they may be holden. *Secondly*, his wife to lose her dower. *Thirdly*, he shall lose his children, (for they become base and ignoble.) *Fourthly*, he shall lose his posterity, for his blood is stained and corrupted, and they cannot inherit to him or any other ancestor. *Fifthly*, all his goods, and chattels, &c. And reason is, that his body, lands, goods, posterity, &c. shall be torn, pulled asunder, and destroyed, that intended to tear, and destroy the majesty of government. And all these several punishments are found for treason in holy scripture."

The appalling ceremony, consisting of the drawing, the hanging, the embowelling, the tearing out the palpitating heart, and the quartering, are then supported by the following quotations.

1 Kings ii. 28, &c. Joab is dragged to execution, &c.

Esther ii. 22, 23. Bigthan and Teresh were hanged, &c.

Acts i. 18. Judas having hanged himself, and falling headlong, burst asunder in the midst, and all his bowels gushed out.

**2 Sam. xviii. 14, 15.** And Joab took three darts in his hand, and thrust them through the heart of Absalom, while he was yet alive in the midst of the oak, &c.

**2 Sam. xx. 22.** Then the woman went unto all the people in her wisdom, and they cut off the head of Sheba, the son of Bichri, &c.

**2 Sam. iv. 11, 12.** David commanded his young men, and they slew Rechab and Baa-nah, and cut off their hands and their feet, and hanged them up over the pool in Hebron"!!

I apprehend whatever weight these arguments might have had in the seventeenth century, they will be considered by christians of the present day as well characterised by St. Paul, when he calls the Mosaic dispensation "weak and beggarly elements," serving only to conduct us to the more perfect law of the gospel. The jurisprudence which is suited to a people, in the first stages of civilization, is not suited to them in the last; and however highly the Mosaic law is to be valued, as the repository of all that was wise and just in the age during which it existed, the most scrupulous Christian need not hesitate to admit, that it has been superseded, not only in its rites and ceremonies, but also

in its peculiar institutions, and therefore is no longer to be regarded as a prototype for a municipal code. Indeed, a scheme of government claiming to be a theocracy which is under the immediate control of the Deity by a special revelation and visible superintendance, can never be an example for any other nation not enjoying the same enviable, but anomalous, distinction.

The same remarks will almost wholly apply to the moral and political economy of the patriarchal state; for though the conclusion should be just, that “ Whoso sheddeth mans’ blood, by man shall his blood be shed;” and “ Every one who findeth a murderer shall slay him;” yet, it would not be safe, however highly we may value the Old Testament, to rely exclusively on this authority, if the spirit of the New Testament, breathing a milder spirit, would lead us to adopt a less sanguinary temper.

I would not be here understood to discuss the question, as I have already disposed of it; but merely would attempt to satisfy the reader, that a code of laws adapted to an age so totally unlike the present, can never reasonably be appealed to as an unexceptiona-

ble criterion, by which to determine the political regulations of the present day.

Another question to be examined, of the utmost importance, is, whether the penal law should be so framed as to leave little discretion in the breast of the administrators of justice; or, whether the same persons should be permitted to exercise a large discretion.

This interesting point was rather fully entertained by the House of Commons when the lamented Sir Samuel Romilly, in the year 1810, brought forward his bills to repeal the Acts of the 10th and 11th of William III. 12th of Ann, and 24th Geo. II. which made the crimes of stealing privately in a shop, goods to the value of five shillings; or in a dwelling-house, or on board a vessel in a navigable river, property of the value of forty shillings, capital felonies. The able mover of these bills not only combated the opinions of Dr. Paley, who is friendly to great latitude of discretion, in the House, but he also published a pamphlet at the same time, in which he has more fully explained himself.

“There are two methods,” says the Arch-

deacon, " of administering penal justice. The first method assigns capital punishment to few offences, and inflicts it invariably. The second method assigns capital punishments to many kinds of offences, but inflicts it only upon a few examples of each kind."\*

To this latter position Sir Samuel Romilly replied, that the Acts he proposed to repeal, inflicted death, although the offences were not of that heinous kind as to deserve it; and that the *only* proper objects of capital punishment are those persons, who have committed acts, which the public security requires should be thus punished: that the laws should be so framed, that upon none but those can death be inflicted; that there needs no selection of objects for punishment, in those who administer the law; the law itself has made the selection. If there is to be any selection by those who administer the law, it ought to be a selection of the few to whom mercy is to be extended, and not of the few on whom punishment is to fall. But the works of these distinguished authors are in the hands of every body,

\* *Moral and Political Philosophy*, Book vi. chap. 9.

and it is therefore the less necessary to give a digest of their respective opinions. I know not whether the reader, in referring to them, will think with me, that there is a want of perspicuity, both of thought and of expression, in Sir Samuel's pamphlet; and that however good his argument may be, it will never compensate, in the estimation of the generality of mankind, for that translucent language in which Dr. Paley always clothes his ideas. This imperfection, so detrimental to his cause, will however find a sufficient excuse in the arduousness of his professional engagements, and in the haste in which he was obliged to write, if he wrote at all. It is happy for society, that his intervals of relaxation were thus employed.

The merits of the question he discussed lie in a small compass. They were simply, whether the punishment of death could be inflicted justly, for the offences of privately stealing to the value of five shillings in a shop, or of stealing forty shillings' worth of property in a dwelling house, or from on board a vessel in a navigable river. The principles laid down in the foregoing pages lead us to the conclusion, that neither the protection of any individual, nor the public

safety, requires such an extreme measure; and it is never worth while to sacrifice so important a rule, as that which regards the sacredness of life, for the possibility of some case happening, which may be so aggravated as to justify such a proceeding. Of all the convictions that have yet taken place for these crimes, not one, in my opinion, has been so aggravated; and, even in the estimation of the executive authorities, out of 1872 persons committed to Newgate for stealing in dwelling-houses and shop-lifting, only one solitary individual could be selected, who was considered, in their opinion, as deserving of death. Such a fact speaks volumes in favour of repealing the laws, which would have inflicted death upon 1871 persons; and who were saved only by a defect of evidence, by the fictions of law, the perjury of a jury, or the mercy of a judge.

It is with regret that I take another objection to the pamphlet of Sir Samuel Romilly; but I am the more induced to do it, because it appears to me, that the best and most zealous criminal reformists often fall into the same error.

Although I most cordially agree with him,

that the latitude of punishment is too great, and that no man, or set of men, ought to arrogate to themselves the right of destroying life for any offences short of the most heinous, yet this skilful advocate seems to me to expect too much from the precision of statute law. He would have it so explicit as to leave as little as possible to the discretion of the judge, and would award to every species of crime its own particular punishment; and when so awarded, he would have it inflexibly executed. The exceptions, he says, should be the few who deserve mercy, not the few on whom punishment is to fall.

As we only differ on the degree of limitation to be prescribed, and not as to the propriety of limitation wholly, it is not easy to state the question so as to render it unexceptionable. The points on which I differ from him, and the benevolent persons who support his doctrines, will be best seen as we proceed.

I confess myself unable to go all the lengths of his opinion, and I think it is supported more by the weight of Sir Samuel's character than of his arguments. That the offences he had in view were not fit subjects

of the severest punishment the law can award, I most fully admit; but, that, barring this extremity, they are capable of being so defined as to enable legislators to lay down a strict rule, by which the administrators of the law are to be governed, and yet administer justice, is a question of more difficulty. What can admit of a greater latitude of guilt than the act of stealing from a shop, or from a bleaching ground? The culprit may do it from necessity, in broad day-light, without malice, and the article stolen may not be worth more than five shillings. Another case may happen where the leader of a gang may lay a deep scheme to effect his purpose, may conceal himself in the dwelling-house, may carry off a large quantity of valuable articles of an industrious and indigent tradesman, and all this, not from poverty or want, but as the business of his life, and to gratify himself in rioting and drunkenness, and the dismemberment of society. Will any one pretend to say, that these two criminals would be equally guilty, or would be doing an equal injury to society; and that it is possible to lay down a rule which should embrace both, and yet should award a proportionate punishment to each? It is the turpitude of the crime, and its injury to society, not its tech-

nical character, that must be the measure of its punishment; and no technical rule, however ingeniously worded, will ever embrace all the moral shades and combinations that take place to produce mens' actions.

It is very true, as has been remarked, that criminals are often punished for something else besides the crime they are convicted of; such for instance as when they suborn witnesses to establish a false defence, or their characters are notoriously depraved. In such cases an addition is made to the severity of their sentences: and surely such a proceeding is perfectly just. Delinquents do not altogether suffer for their actions. They are not the only occasions of punishment; but if justice could be administered perfectly, they would suffer for the principles, of which those actions are but the evidence. Does the law attempt to punish children or madmen, whose actions may be very detrimental, and yet are not fit objects of penal legislation? Does an individual act rationally when he resents an accidental blow, which proceeds from a person who bears no ill-will towards him? The truth is, that the degree of punishment can only be proportioned to the crime, by looking to the motives and *quo animo* of

the criminal; and these are to be collected, not only from the circumstances of the particular offence for which a man is tried, but from his previous life and conduct, which give the character to his actions, even more satisfactorily than the particular incidents accompanying a single act. However much the artificial rules of law may confine the enquiry to the particular offence to be tried, (a rule no doubt which is wisely contrived,) it is impossible for the judge, who is guided by his conscience and moral judgment, to determine on the demerit of an action without looking to all the motives which have produced it. It is thus we estimate private injuries; and no satisfactory reason can be shewn why a different rule of judgment should be adopted in estimating public injuries.

If these observations be correct, how is the law to graduate its sentences so as to meet every case, which may happen between that which has the least moral guilt in it, and that which has the greatest? That many excellent persons think this is to be done, is evident from the tenor of their observations; but it is to be feared, that such an attempt would throw still greater obstacles in the way

of justice than already exist; and that the courts of law, instead of acting conscientiously, and being directed by their moral judgment in estimating virtue and vice, would be so bound down by the letter of the law, as to be disabled from exercising those faculties which are absolutely essential to the administration of justice. They would become mere verbal expositors of an imperfect text, and have no need of that high sense of honour and of virtue, which are the best ornaments of the judicial character.

The French penal code allows much greater latitude of discretion to their courts in convicting a prisoner than the English code does; and the admonition, which is directed to be read to the jury by their foreman, before the verdict is deliberated on, is an example of the discretionary authority with which they are entrusted.

“ *La loi ne demande pas compte aux jurés des moyens par lesquels il se sont convaincus; elle ne leur prescrit point de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve: elle leur prescrit de s'interroger eux-mêmes dans le silence et le receuillement, et*

de chercher, dans la sincérité de leur conscience, quelle impression ont faite sur leur raison les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur dit point : *Vous tiendrez pour vrai tout fait attesté par tel ou tel nombre de témoins* ; elle ne leur dit pas non plus : *Vous ne regarderez pas comme suffisamment établie toute preuve qui ne sera pas formée de tel procès-verbal, de telle pièce, de tant de témoins ou de tant d'indices* ; elle ne leur fait que cette seule question, qui renferme tout la mesure de leurs devoirs : *Avez vous une intime conviction?*\*

It may also be remarked, that such an attempt to accommodate the law to specific crimes would inevitably subvert another principle which is regarded as important. It is very true, as Sir Samuel Romilly has stated, that “ the certainty of punishment is much more efficacious than any severity of example for the prevention of crimes. So evidently is the truth of that maxim, that if it were possible that punishment, as the consequence of guilt, could be reduced to an absolute certainty, a very slight penalty would be sufficient to prevent almost every

\* Code d' Instruction des Affaires soumises au Jury, Art. 342.

species of crime except those which arise from sudden gusts of ungovernable passion. If the restoration of the property stolen, and only a few weeks, or even but a few day's imprisonment, were the unavoidable consequence of theft, no theft would ever be committed. No man would steal what he was sure he could not keep; no man would, by a voluntary act, deprive himself of his liberty, though for but a few days. No man would expose himself to certain disgrace and infamy, without the possibility of gain. It is the desire of a supposed good, which is the incentive to every crime; no crime, therefore, could exist, if it were infallibly certain that not good but evil must follow, as an unavoidable consequence to the person who committed it. This absolute certainty, it is true, can never be attained, where facts are to be ascertained by human testimony and questions are to be decided by human judgments. But the impossibility of arriving at complete certainty, ought not to deter us from endeavouring to approach it as nearly as human imperfection will admit, and the only means of accomplishing this, are a vigilant and enlightened police, rational rules of evidence, clear and unambiguous laws,

and punishments proportioned to the offender's guilt."\*

Though these are the objects for the legislator to keep in view, it is important that he should be aware how far they are capable of being carried into practice ;

Adsit.

*Regula, peccatis quae poenas irroget aequas :*

*Ne scutica dignum horribili sectere flagello.*

This I trust is as much *my* motto as it is theirs, who "would have the aggravations of crime clearly and accurately described, in written laws, and would submit these aggravations to the decision of a jury, in the same manner as the crimes themselves." The question between us is briefly this, how far written laws are capable of distinguishing degrees of crime, and supplying the place of moral deliberation.

This is a question not so much of preference as of practicability. On the one side we have to provide against the temptation to do injustice, and yet to reach every offence ; and on the other we have to guard against shackling the conscience and fettering the moral judgment of those who have

\* Observations on the Criminal Law of England, p. 22.

to administer the law. Strict rules require a strict exposition; and so difficult is it for language to embrace all the possible combinations entering into the actions of men, that wherever the law is most precise, there the greatest number of crimes must escape. In proportion as the liberty of the subject is secured by such means, and the abuse of power prevented, will be the difficulty of convicting delinquents, and preventing future crimes by the certainty of a particular punishment.

As we descend in the scale of crimes, the circumstances under which they are committed become more complex; they admit of being accompanied by a variety of little events which operate as extenuations or aggravations; and consequently, are not so easily brought within the meaning of the written law, and render it very difficult and sometimes impossible to estimate them in a moral point of view. This is not the case with the more heinous crimes, which are characterized by strong and leading marks not to be mistaken. Murder, arson, piracy, and some other atrocious felonies, can be more safely legislated upon than the minor offences, because they are less mixed in their nature, and are so

heinous as scarcely to admit of palliatives. The action here is an indubitable evidence of the atrocity of the principles of the malefactor.

It is this imperfection in language that prevents us from adhering to those lines of distinction among crimes, which we are accustomed to adopt in the common forms of speech. The law requires so much more correctness than the ordinary communications of mankind, that it completely fails when it is compelled to enter into a definition of all its objects. "How would my honourable friend," asked Mr. Windham, "describe homicide so as to delineate an offence which should include every case that ought to be punished, and not exclude any case deserving of punishment? To be sure, a distinction may easily be drawn between excusable homicide and murder. Every person perceives a difference between the act of a man who kills another for his purse, or way-lays him for revenge, and the act of two men who have been together in a public-house, where, in the course of their conversation they quarrel, and one of them, greatly provoked, takes up the pewter pot and kills the other: but if I am asked, whether this hasty act is murder or manslaughter, must I not know all the cir-

circumstances, in which it originated, and with which it was attended? And can any definition describe all these circumstances? I remember an instance some years ago, where a man being provoked in a shop, immediately went over the way and returned with a knife, and swore, that if any one provoked him again, he would run the knife into him. Another quarrel ensued, he stabbed his antagonist in the belly, and his bowels came out. These, and a thousand other instances which might be adduced, must shew that every single case must rest upon the circumstances with which it is attended. This must be left to definition or discretion. If the system of definition be introduced, a single hair may save the most atrocious offender. Precise definition is impossible: much must be left to the juries and to the judges of the land. It is impossible to work well by machines; and, if an attempt be made at this perfect operation by law, it will soon be discovered that some of the wheels are defective."

Now in order to prevent the inconvenience which might arise from investing fallible men with unlimited power, legislatures have been obliged to interpose, between the criminal and the court, rigid forms and sta-

tutes, in order to protect the life and liberty of the subject. But the strictness of these regulations, binding to the very letter, and explained at a remote period, are at the best but imperfect guides, and have in some respects a strong tendency to defeat the end of justice, both as it protects the public and the delinquent. For though they in some measure prevent the indulgence of vicious inclinations, they exclude, in a great degree, the exercise of the virtuous ones, by frustrating the moral judgment, which ought to be conscientiously exercised both by judges and juries in determining on the guilt or innocence of the prisoner before them. Instead of this, the law attempts to convict a delinquent by rules of art; and if it could succeed in what it attempts would produce the result in much the same way as a geometrical demonstration is produced. It would proceed step by step in its inductions, with the most rigid adherence to terms and definitions; and, upon the failure of any link in the chain, would be defeated.

There is something extremely irreconcileable with the pure principles of justice, that it must be administered by such an automatic process; and assimilates it too much to

the operations of a mill. It savours strongly of the scholastic prejudices of early times, though at the same time it cannot be doubted, but that our ancestors conceived they saw solid reasons for the plan. Nor can it be denied, that there is a variety of cases in which these rules afford protection; and that they have often shut out the malevolent passions of men, who in former times, more than in the present, carried their predelictions and antipathies to the sacred tribunals of justice.

As mankind improve, however, there is the less necessity for fettering them with rigid rules, which, from their very nature, can only apply to a limited number of cases; and besides this, experience, as well as reason, shews us, that men will not submit to have their consciences thus dictated to, but will elude the rule, when it contradicts their common sense, by some fiction they will raise in their minds. Thus a ten-pound promissory Bank-note has been declared to be worth less than forty shillings; and notes of the same kind to the amount of one hundred pounds, have been declared by an English jury, whose probity was never suspected, not to be worth two pounds. The question, in such cases, which a juryman asks himself is evi-

dently this, "Am I to break through the forms of law, or the dictates of conscience?" "Which is most binding upon me, regulations over which I have no control, and which are forced upon me by the terrors of society, or, the laws of nature and the dictates of common sense?"

It was under the influence of the apprehension that judges would abuse their trust, which induced the benevolent Beccaria to remark, "In every criminal cause the judge should reason syllogistically. The *major* should be the general law; the *minor* the conformity of the action, or its opposition to the laws; the *conclusion* liberty or punishment. If the judge be obliged, by the imperfection of the laws, or chuses to make any other, or more syllogisms than this, it will be an introduction to uncertainty.

"There is nothing more dangerous than the common axiom; *the spirit of the laws is to be considered*. To adopt it is to give way to the torrent of opinions. This may seem a paradox to vulgar minds, which are more strongly affected by the smallest disorder before their eyes, than by the most pernicious,

though remote, consequences, produced by one false principle adopted by a nation."

The use or abuse of forms and rules rests here. As they restrain human conduct within a prescribed circle, they are important when the tendencies to wrong conduct are greater than the tendencies to right conduct; but they seriously interfere with practical justice, when courts of law are occupied by virtuous men, or when cases arise not within the contemplation of the rule laid down. This must frequently happen when the letter of the law is a fixed and unaccommodating standard to measure the infinitely varied character of moral actions. In the proceedings of a court, though many parts may no doubt be advantageously regulated by forms and precedents; yet the most essential part, depending for its just result on moral reasoning, will not admit of being fettered down by strict definitions, and especially by regulations of former ages, which have assumed the solemnity of being legal axioms, on account of the length of time they have been adopted. It is a practice, which must yield to the improved state of moral feeling, that virtue may be consistent with herself. The general principles of justice will one day require this sa-

crifice, or it is to be feared that the courts of law will become hampered in their own net. The law of God, as delivered to us in the scriptures, avoids this inconvenience by admitting an interpretation consistent with the spirit of it; or, which is the same thing, by treating the language as a mere collection of signs, which have a relation to certain ideas of right and wrong already existing in the mind.

On the other hand, if we scrutinize the meaning of the word *law*, as applied to legislative enactments, we shall find this idea to be essential to it; that it disposes of certain variable relations and contingencies arising out of mens' actions, so as to make their connexions constant and invariable. It attempts to arrange in a coherent series, the causes and effects of human conduct, infinitely diversified as they are, by the aid of a written instrument, which is incapable of expressing their different and endless modifications.

The difficulty of applying such a text will of course encrease as the offences, with which our fellow-creatures are charged, are in themselves equivocal, or their springs of

action remote and vague. Added to this, the evidence by which the misconduct may be proved, may be by contrary testimony, contrary probabilities, contrary presumptions, all of which must be weighed by an unfettered judgment, which will give the preponderance to the side that has the greater degree of credibility. Thus it happens that the law succeeds best when its proceedings are directed against the more heinous crimes, and worst when it would punish the more venial. In the latter cases a more liberal interpretation of the law, has, from necessity, been allowed; and when this is done, an appeal is made to a higher principle of action, than merely expounding a written text of human origin; and the decision is made, not by rules of art, but by the application of moral science adapted to the subject.

However desirable it may be to abolish capital punishments for inferior offences, as contrary to the spirit of humanity, to public opinion, and to the constitution of human nature, we must still repose great trust in the virtue and integrity of our judges; and leave to their breast to determine, in most cases, the turpitude of the crime, and the degree of punishment to be awarded to

it: and this must necessarily be done, in order to bring human law as near as possible to the moral law which governs the world, and which has for its object to determine on mens' actions, by the motives which produce them. By laying down an enlarged and liberal principle of action, the administrators of the law would be enabled to keep pace with the improved state of public knowledge, and not, as is sometimes seen, be lingering behind, fettered by exploded opinions, belonging to another age.

Should a contrary system be introduced, it is to be expected, that more injustice would be done either to the public or to criminals. Stricter definitions would leave more loopholes for the escape of the wary, and the uncertainty of conviction would be increased in an alarming degree. It is the latitude given to the judges and juries that oftentimes enables them to punish at all; but if every crime were subject to a specific punishment, the exceptions would entirely escape, and the exceptions would make up the majority of cases. In instances where the sentence was considered as unsuitable to the crime, judges, juries, and prosecutors, would entertain the same objections to carry the law

into effect as they feel now. The practice of our courts would still wider diverge from established opinions than it has hitherto done; and instead of having to contend with the law as a dead letter, the judges and juries would have to contend with it, being new, as a living spirit. The practice, which has grown up and is established, is a surer guide for the reformation of the criminal law, than the introduction of so novel a system as the foregoing would unquestionably be.

There are difficulties on either side to be guarded against, and however great those may be which arm the representatives of the sovereign with a large discretion, it is to this circumstance that we are indebted for whatever improvement in practice has taken place in the administration of the criminal law. Had they been bound down by such a law as many friends of reform would have them to be, they would neither have had it in their power to yield to the opinions of the public, nor to their own convictions. The same discretion leaves them at liberty to improve the system in future, and it would be one of the most unfortunate innovations of modern times, should an attempt be made to construct a criminal code, which should require

nothing more from the judges than the exposition of its meaning. It is as virtuous men, and not as expositors, that they can administer justice.

But it is not enough that we look only at this side of the question. Laws are intended to protect the life and liberty of the subject from the oppression and prejudices of the executive authorities, as well as from the mischief of criminals. It has always been considered as a dangerous practice to entrust to one man, as in criminal judicature, the destiny, and perhaps the future welfare of men, some of whom may be guilty, while others are innocent. To prevent any undue influence of the judge, we have interposed between him and the prisoner, a jury of twelve men, chosen indiscriminately, who are directed to determine on the facts of the case; and this institution we are accustomed to regard as the bulwark of our liberties, and the pride of our political constitution. It is not intended by the foregoing observations on the irreconcileableness of strict law with a virtuous administration of justice, to cast any imputations on this invaluable prerogative of Englishmen, that he shall be tried by his peers, but merely to check the sanguine

expectations of some of the friends of reform as to the capability of a written law. On the contrary, if the framers of our law will keep the imperfection of language in sight, there is no doubt but that many regulations might be introduced, which would not interfere with the most ample discretion of the judges, nor reduce them to the necessity of becoming verbal critics, instead of exercising their highest virtues. The representation I have ventured to make in the preceding pages is pressed upon the attention of the reader rather more earnestly, because it is one which is liable to be overlooked, and seems to me not to have been duly considered even by some politicians of considerable importance.

No doubt can possibly exist of the propriety of restraining our courts of law by explicit regulations; and the more likely men are to be biassed in their opinions, the more necessary it is to interpose these securities. In questions arising out of political offences, it is to be feared, that even the purity of the ermine will not always and entirely prevent a leaning towards the inclinations of the Crown, which is the fountain of honors and of affluence. In these cases, therefore, it is absolutely necessary, that stricter rules, and

a more rigid interpretation of them, should be introduced, than is necessary in the administration of the criminal law, where the judge enters upon the case without any knowledge of the parties or the circumstances, and without any latent prejudices which will pervert his mind.

Whether it would be possible to adopt any *system* of penal law superior to that which now prevails, is not worth discussing, since whatever is done must be accommodated in the easiest manner possible to existing institutions. The practice of our courts has pointed out some palpable improvements, the introduction of which will be comparatively easy. The abolition of death as a punishment for inferior offences is evidently one no less consistent with practice than with theory, and will after all be no such great boon to yield, since the executive power, if the punishment should remain upon the statute book, will be unable to employ it with any good effect, as long as the opinion of the public is opposed to such a system.

## CHAPTER VI.

*Of imprisonment—of transportation—of the causes of failure in punishment—whether to be attributed to the government, the laws, or the people—of the conclusions to be deduced from the whole discussion.*

AT the latter end of the fourth chapter I endeavoured to point out the advantages which belong to imprisonment as a judicial punishment; but as this mode has lately undergone some severe strictures, and the facts which have been published by some observing and unprejudiced philanthropists, have brought the practice into disrepute, it is necessary to endeavour to trace the cause of failure to its source, and to point out the means of improving the system.

Imprisonment recommends itself beyond all other methods of punishment, for various reasons. In the first place, it is capable of the minutest divisions as to duration and degree

of suffering. It is completely restrictive ; is capable of being remitted at any time ; and may be made exemplary, and conducive to the moral improvement of the prisoner. To the confinement may also be added labour of various degrees and kinds, civil degradations, fines, and confiscation. Solitude, darkness, and regimen,\* may also be occasionally employed, and the tendency of these to produce repentance and contrition is highly serviceable.

No other mode of punishment presents so many recommendations. The tremendous penalty of death cuts short nearly all hope of reformation, and though it would be arrogant to say that no cases of sincere contrition take place between the sentence and the execution, it is to be feared that by far the greater majority of convicts are "launched into eternity" impenitent and hardened ; and that it is generally impossible, in the time that is allowed, even for the most apt teachers to convince them of their errors, or to communicate those high and noble sentiments which are the characteristics of

\* See Note (L) Appendix.

religion and virtue.\* If we look to the nature of virtue and vice, such a total rupture of all old associations and principles is not often to be expected; and it is an appalling reflection, that we are the voluntary instruments of sending a fellow-creature to the bar of God, where we believe he will receive the judgment of eternal misery. Besides, executions have happened where the sufferer was subsequently proved to be innocent; or where the royal clemency intended to reprieve him, but for a mistake in the post-office or in the superscription of a letter, and it is no small deduction from the expediency of a punishment, that such things may happen again.

Now imprisonment is not liable to these objections, as it is at any moment capable of being remitted; and should the judgment of the law be found to have been erroneous, the sufferer is still alive to receive all the compensation, both in sympathy and recompense, that society is capable of yielding. As long as he is on this side the “bourne whence no traveller returns,” the most atrocious villain may become a penitent; and, at any rate,

\* See Note (M) Appendix.

we are not the immediate and gratuitous agents of sealing his eternal doom.

After imprisonment, relegation and perpetual banishment are probably the least objectionable punishments. The rights of defence most completely authorize such a mode of disposing of the refractory members of society; yet I cannot but think, that instead of selecting the worst characters for transportation, we should rather prefer the least atrocious. They are intended to be the founders of a colony, which at some future day we would hope will become the strength and the comfort of the mother-country. Why then do we retard this period by populating the distant country with the very refuse of our own? And why give every encouragement, and even enormous bounties, for the propagation of a class of beings inferior to the savage, inasmuch as his appetites and instincts are as they were created, and in a natural progress towards a better state; while transported convicts possess all the gross appetites of the savage, and are retrograding towards a worse state of barbarism and wickedness. The ignorance of the Indian greatly abbreviates his power of doing evil; the convict, on the contrary, by his acquaintance with letters has

his mischievous inclinations enlarged, and he is enabled and strongly inclined to make himself acquainted with the arts that promote his wicked purposes; and whether it be to destroy his fellow-creatures, or to despoil them, his knowledge gives him a thousand-fold advantage. He is a savage in vice, without being a savage in ignorance.

The opposite character of the people inhabiting the northern and southern of the United States of America is a sufficient proof of the importance of attending to the moral dispositions of the first colonists. New England was settled by a race of men, who, with all their fanaticism and misanthropy, were acknowledged, even by their enemies, to possess untarnished morals. Indeed, such a body of heroic and highly-gifted colonists, consisting of thousands of the better class of society, will never form the rudiments of any other community, since the same combination of circumstances, which fitted them for the undertaking, can never again occur. The southern states, on the contrary, had their population encreased and deteriorated by the annual accession of convicts from this country; and it is to be feared, that the quarrelsomeness, profanity, idleness, and drunk-

enness of the Carolinians and Virginians, is to be attributed, in a great measure, to the reprobate character of these early settlers.

Nor does our new establishment at Botany Bay promise a very favourable result. Out of ten thousand convicts, which is a moiety of the population of the whole colony, there are but few who seem to be much benefited by the removal. Their history is one tissue of conspiracy, and rebellion, and excess. The women, who in other societies are generally the better part, are here the worst: compared with the men they are few in number, and it is probable that this circumstance has greatly contributed to their unexampled depravity. In America the convicts were bound to employers, and after a while were scattered and amalgamated with the mass of the population; but in the new colony they are confined to particular spots, and their occupation is under the *surveillance* of the military. The moral instruction which can be provided must necessarily be scanty; and it would appear as if the convicts felt no interest in that little which is provided. How lamentably do some persons mistake the application of their means, when they compass sea and land to proselyte the savages of the

Pacific Archipelago, and pass by a colony of our own founding, united to us by country, language, and other predilections, and promising to moral instructors a most abundant harvest. It is time, that the attention of the humane was aroused to the consideration of this subject, and that they were no longer content to leave this unhappy people to be reclaimed by the calculating and statistical process of the law. We forget, that when the statesman has given us a beneficent statute, it remains for the public to carry it into effect.

But although these punishments contain the chief properties we want, experience has unhappily shewn us how inadequate they are to produce the end for which they are created; and how lamentably in general they have strengthened the diseased they are intended to cure. Gaols, instead of being hospitals for depraved minds, have become places of endemic contagion; and those who have gone into them with only tarnished characters, have come out of them incurable villains. The publications of Mr. Howard, Mr. Neild, and more recently of Mr. Buxton and Mr. Gurney, prove this fact beyond all doubt; and the question arises, to what causes are we to attribute this defective state

of our prisons? Is it to the misconduct of the executive authorities,—to the laxity of the law,—or to the neglect of the people?

The internal management of prisons is not one of those points, which is likely to create much interest or jealousy among statesmen; or on which they are necessarily more prejudiced than other men. On questions of peace and war; patronage, power, and taxation, they are naturally sensitive; but in cases which are destitute of personal advantage, and which excite only the benevolent feelings, they are not more insensible than the rest of the world. The punishment of death for crimes without force, is a point they may perhaps be unwilling to yield on account of its connexion with the system of absolute power, which has been claimed equally by popular and monarchical governments, and which has been thought necessary to enable them to manage refractory subjects. But though this may be true of capital punishments, it is evidently not true of the internal detail of prisons and prison discipline. There is no reason to believe that legislatures have been improperly influenced to adopt any other methods than such as appeared necessary to answer the desired end; or that

they have turned a deaf ear to the complaints of sufferers or philanthropists ; or to the suggestions of the wise and the experienced. Our own legislature has been constantly working upon the subject ever since the days of Elizabeth—the great epoch of legislation—down to the present period ; and it is neither generous nor prudent to lay the miseries and crimes, which have so multiplied upon us, exclusively at their door.

Perhaps no class of persons has been more disposed to call for Acts of Parliament to rectify the disorders of society than philanthropists ; and most assuredly the British parliament has not been backward in attending to their requests. Most of the severe statutes, which are now very properly the subject of complaint, had the sanction of the wise and good of the respective periods in which they passed ; and it should be recollected, that though some individuals have always objected to the penal code as too sanguinary, it never contradicted the public opinion until now. The Hales and even the Howards of the last century did not see it in the same light as we do ; but thought that severe laws were necessary to repress the wicked, and protect the innocent. Besides, it ought not to be forgotten,

that the courts of law have gratuitously put into our hands the strongest weapons of all against the system ; and, in order to adopt a practice conformable to a more enlightened opinion, have acted contrary to the spirit of the statutes which ought to control them. They have most assuredly in this case been beforehand with the public, having adopted a milder dispensation long before the popular voice was raised against the old practice. The judges and the king in the exercise of his dispensatory power have indeed given the death-blow to the sanguinary system, by adopting another of an opposite description ; and this they did, not in obedience to the demands of the people, but on the representation of a few benevolent individuals, whose efforts at last have roused the attention of the whole kingdom to the consideration of the subject.

At the beginning of his present Majesty's reign persons occupying bleaching grounds had great depredations committed on them, owing to their property being so much exposed night and day. In consequence of this, the persons interested, instead of reme-dying the mischief by the palpable method of employing honest watchmen, got an Act passed to supply their place, making it death

to steal property of the value of five shillings from a bleaching ground ; and the legislature in Ireland, true in its response, passed a similar one, but enlarged the value of the property stolen to ten shillings. What has been the consequence ? The law did not answer their expectations ; and the same persons, or their immediate descendants, petitioned Parliament to repeal these laws as inefficient and sanguinary. Their improved benevolence may be admired ; but it is to be feared, that they will again be disappointed, if they suppose the only reason why the law is ineffectual to restrain these depredations, is, as they state, owing to the lenity of the prosecutors, the unwillingness of juries to convict, and the general leaning to the side of mercy, because the letter of the law authorizes a punishment, which the administrators of it shew by their practice that they deprecate. The influence of these reasons one would imagine to be very small, since the persons who employ them will find it impossible, I believe, to point out a single execution that has taken place within the last ten years for an inferior degree of the offence. It is not, then, easy to credit the assertion, that prosecutors and juries are prevented from doing their duty in these cases by the

bare possibility that the judge may estimate the crime so extremely different from themselves. Is it likely that the understandings and moral feelings of prosecutors and juries are so far before those of judges, that they cannot act together? Or that the virtue and intelligence of the former far outweigh the same qualities among the latter? I am persuaded, if the law were altered to-morrow, most of these objections would occur under other shapes, and that in but few cases they are really what they are assumed to be. It much oftener happens, that the aggrieved person is not very sensible of the injury done to society, and is much sooner influenced by the cold calculations of loss of time and money, and the inconveniences he must suffer, if he becomes a public prosecutor. The contamination of prisons much more frequently determines benevolent men to pass over an offence, than the reasons stated by the bleachers. Indeed the practice of our courts for some time past has been a sufficient guarantee, that the capital part of the punishment will be remitted, and that the crime will only be visited with a degree of punishment proportioned to its malignity. How that degree is ascertained, seldom or ever enters into the calculation of prosecutors.

If we look into the history of prisons we shall find the statutes which refer to them very numerous, and the powers they confer very ample.

Gaols belong to the king, and are in the keeping of the sheriffs, and since the 5 Hen. IV. c. 10. he cannot even grant the custody of prisoners to private individuals. Nor can the office be purchased. Until the 11 and 12 W. III. c. 19, gaols could not be erected but by Act of Parliament; but that statute gave to justices of the peace the power of building, finishing, and repairing them within their jurisdiction, at the charge of the county. This Act has since been explained and amended, and made perpetual.

A great number of very beneficial regulations have been made at various times to correct the abuses of prisons. By the 22 and 23 Car. II. c. 20. the felons and debtors are directed to be kept in distinct apartments. The selling of all spirituous liquors is forbidden, and the 14 Geo. III. c. 59. points out a variety of methods to prevent the gaol distemper. Cleanliness and ventilation are to be strictly attended to; the walls and ceilings are to be white washed once every year;

rooms are to be set apart for those who are sick, and bathing tubs and baths are to be provided. A copy of the provisions of this statute is to be suspended in some conspicuous part of the prison; a regular medical attendant is to be appointed with a salary, and to report to the justices in quarter sessions the state of the health of the prisoners. The magistrates are empowered to order clothes for the prisoners where they see it necessary, to prevent them from being put underground if possible, and to make such orders for the internal management of the prison they shall think fit.

The law has also provided for the religious instruction of prisoners. Justices are authorized to enquire into the number of clergymen requisite to perform divine service according to the rites of the church of England, and to appoint those whom they may think fit for the duty, on salaries not exceeding fifty pounds per annum. Prisoners, not condemned to hard labour are allowed to work for themselves, and a stock to any extent may be provided.

Besides this, the 31 Geo. III. c. 46. requires that two justices shall be appointed at every quarter sessions as visitors to their pri-

sons; which duty they are to perform three times at least in the quarter. The power of visiting, however, is not confined to them; for any justice may at all times examine the places of confinement within his jurisdiction; and any abuses discovered, either by the report of the visitors, or otherwise, are to be rectified by the magistrates assembled in quarter sessions. Rules and orders for the internal management of prisons, and for prison discipline, are to be made according to the directions of the 32 Geo. II. c. 28., and the 24 Geo. III. c. 56. Provision is also made for procuring employment, and the justices are directed to order such sums of money as may be necessary to support those who cannot support themselves. For the encouragement of reform, the visitors are directed to report cases of extraordinary diligence, or merit in the convicts, to the judges of the assizes, who may recommend them to the royal mercy; and if, in consequence of this notice, the time of their confinement is shortened, they are to receive on their discharge, a sum of money not less than five, nor exceeding twenty shillings, with necessary clothing.

Houses of correction are of modern origin,

though even these are as early as the 18 Eliz. c. 3., which ordains that they shall be provided in every county, by order of the justices in quarter sessions ; and also stock and implements, for setting on work, and punishing all such as shall be taken as rogues, or are punished as rogues. The like power is given by the 39 Eliz. c. 4., and enlarged by the 7 Jac. c. 4. The preamble to this act complains of the defects of prison discipline, and that the good and necessary laws have not wrought so beneficial effect as was expected ; for remedy whereof it again requires, that houses of correction shall be built, and that in default thereof justices shall be fined. A governor is to be appointed with a salary, and the persons committed are required to earn their livelihood, so that they shall in no sort be chargeable to the country for any allowance, either at their bringing in or going forth, or during the time of their abode there ; and shall have such and so much allowance as they shall deserve by their own labour and work. The justices are directed to visit the house twice in the year at least, to see this statute executed. The sick and disabled are to be relieved at the expence of the county. The governor is required to give security for the continuance and performance

of his service, and to be fined for misconduct. To these houses of correction was to be attached land, together with mills, turns, and such like necessary implements, to set rogues, vagabonds, and disorderly persons on work. Besides this, the governor is authorized to punish his prisoners by ironing them, or by moderately whipping. The 22 Geo. III. c. 64. provides that the women shall be kept in distinct parts of the house. The justices are to furnish these prisons as soon as they are erected with mills, looms, and other utensils for work ; and from time to time, with all the raw materials for labour. They may also appoint persons to instruct the prisoners in trades. The governor may handcuff any refractory prisoners, but he must give notice of the circumstance to one of the visitors, and cannot continue the restraint beyond six days without an order in writing from one of them. He may likewise employ those not committed for *hard* labour in any work that is not severe, giving them half the money they earn. As yet, however, scarcely any *hard* labour has been done, owing to the impossibility of finding a continuance of this species of labour in a prison. The keeper is directed to render a regular account of the conduct of every person in his custody

to the justices in sessions, who may give such farther directions as they may think fit. Houses of correction are to be visited like gaols. A chaplain is to be appointed, and one condition of his receiving his salary is, that he keep a journal, in which he is to enter the times of attendance at the gaol or house of correction, with any observations that may occur to him in the discharge of his duty. All wine, ale, and spirituous liquors, are expressly forbidden to the prisoners. Annexed to this act are several regulations respecting the days, times, and hours of work ; the nature of the employment ; the separation of the male and female prisoners ; their food ; the offences punishable by the governor, and how : and these regulations are to be printed in a legible character, and hung up in some conspicuous part of the prison. All felons are by 5 Hen. IV. c. 10. to be sent to the common gaol ; but by 5 Ann. c. 6. persons convicted of theft or larceny may be sent to the house of correction ; and by the 6 Geo. I. c. 19. vagrants and other offenders charged with small crimes, may be sent to either, according to the discretion of the justices.

This is not all. A still further attempt is

making at the Millbank Penitentiary to carry into effect a system of prison discipline. By the 52 Geo. III. c. 44. minute directions are given for the internal management of this place of confinement, according in general with the regulations of houses of correction. Offenders are to be divided into classes, to be distinguished by a particular dress ; and rewards, as well as punishments, are to be employed to repress evil, and encourage virtue. Four hundred thousand pounds are appropriated to this national undertaking, which is intended as an experiment on the efficacy of employing prisoners, and separating them as much as possible one from the other. It is on the plan of the Panopticon of Mr. Bentham.

In reviewing these statutes it cannot be pretended that criminal punishments have been overlooked by the legislature, or that neglect is attributable to the government. The provisions seem to comprehend such a variety of particulars as might be thought to leave scarcely any thing wanting to complete a penitentiary system ; and yet we seem to be as far from attaining our object as ever. To what cause can this lamentable disappointment be attributed ? To the laws, say some persons : and yet the laws can scarcely do

more than add other regulations of the same kind, descend perhaps more into particulars, and insist more rigidly on the performance of its provisions.—To the indiscriminate association of the young and the old offenders, say others; to the want of instruction, classification, and employment. And yet every county is authorised to build as large and as complete gaols as they think fit, to employ, divide, and instruct the prisoners as much as they please; and to make such internal regulations as to the magistrates shall appear likely to be beneficial. The authority is almost unlimited, and I know not that much more could be added without making it altogether arbitrary. The failure of prison discipline is to be attributed to other causes, than to the neglect of the government, or the laxness of the law.

The impracticable nature of strict laws, which are to govern moral actions, has been before stated. The management of prisoners is one of the cases where definition is in danger of interfering with conscientious motives. The legislature therefore has left it open for the magistrates of the country to employ such means as shall appear to them advisable. They are not fettered by rules and regulations which prevent them from em-

ploying such instruction, and such moral engines, as shall in their view be efficacious. A few intelligible principles are sanctioned and laid down, and they are directed to follow them: and this is really all the law can do for us in such matters. The law cannot make instructors, or prisoners willing to be instructed. It cannot make gaolers cleanly or merciful, though it can insist that their prisons shall be white-washed once in the year, and that they shall not handcuff their prisoners for more than six days.

Laws, which have for their object moral effects, must be executed by moral men. It is quite in vain to expect that the administrators of it, from the judge down to the gaoler, will ever produce any good by means of the law as a mere instrument of art. It may recognise the principles on which men are to conduct themselves towards criminals, but it can never enter into the particular methods of reformation. These must be left to the prudence and the moral capacity of those who have the care of them; and if visitors and chaplains have not had infused into them beforehand a large philanthropy, a great knowledge of human nature, a mild and conciliatory temper, and with a high sense of duty, the

law will never fit them for their places, or supply their deficiencies. The great mistake has been, that an exclusive dependance has been placed on the official persons appointed to superintend the prisons. The magistrates themselves, it is to be suspected, for want of thoroughly studying the question, have depended too much upon the efficacy of the law, instead of looking for a beneficial result from their own unremitting care, and that of others, who, instigated by benevolent motives, will devote their leisure to the same arduous and never-ending task. If ever any good be done to prisoners, it will be performed by those who set a high value upon moral instruction, and who are deeply interested in the welfare of their fellow-creatures —whose zeal in such a cause might be esteemed by the phlegmatic to be enthusiasm ; and whose unremitting attention will do as much by example as by precept. Such persons have been found to undertake the instruction of the females of Newgate, and of the Bristol gaol ; and it is impossible to do them too much honor as the forerunners, we would hope, of a system that shall prevail in every part of the empire. Protestants might here take a very useful lesson from the Catholics, whose religion has always provided a de-

scription of persons, both from among the clergy and the laity, whose chief object is to attend to the miserable beings in hospitals and prisons, and not content with supplying only necessaries for the body, administer comfort and instruction to their minds. Such are the *Sœurs de la Charité*, the institution of the *Misericordia*, and the different orders of mendicant Friars. But as we cannot employ these assistants, we must endeavour to raise up another description independent of any peculiar religious opinions ; and really the tenets are so utterly insignificant, so that they who hold them be but good and prudent, that we should endeavour to press into the service men of all denominations, and should not try them by the orthodoxy of their faith so much as by the zeal in the cause of prison reformation. We must raise up more *Howards*, and *Frys*, and *Buxtons*, who will brave both the physical and moral maladies of our gaols. Then we may hope to see the prison laws executed in their spirit, and the prisoners made the better for the wholesome discipline to which they will be subject. The heinous offender, instead of being rendered more desperate, will be reformed ; the less offender will be restored to

his friends and to society, a penitent, and an useful member.

It is very justly remarked by Mr. Roscoe, in his recent publication "On Penal Jurisprudence," that "it is indispensably necessary, in order that penitentiary establishments should succeed to their full extent, that the principle on which they are founded should pervade, and be continually manifested through the whole establishment." That principle is *benevolence*, exerting itself in promoting the real and permanent welfare of the individuals there confined. Unless this object be fully understood and strictly adhered to, it will be in vain to expect any favourable result. The reformation of the criminal should be the *motive*, the *object*, and the *measure* of all our exertions. Every kind of corporeal punishment should be strictly prohibited. Solitary confinement in cases of extreme obstinacy, should alone be allowed; and this has always been found sufficient to subdue the most obdurate disposition. Every prisoner should be preserved, as far as possible, from contamination, by separate confinement at night, and by a diligent superintendance, whilst pursuing his

avocations, whether alone or in company, by day. When he labours it should be wholly for his own profit, subject to such outgoings for his maintenance, and other just and reasonable objects, *as may be defined*. Independence of character, and ability to provide for himself, are amongst the chief objects of his attainment, and these can never be acquired, unless he be encouraged to *trust to his own efforts*, and incited to *feel his own interest*. Cleanliness of person should be most strongly recommended and rigidly enforced, not only as essential to health and comfort, but as conducive to *moral order, rectitude, and self-respect*. Every disposition to improvement should be encouraged by the expectation, that a diligent perseverance in industry, obedience, and propriety of conduct, will be rewarded by a diminution of the term of imprisonment. A strict attention to avoid all profane, indecent, and offensive expressions, is indispensably requisite, and even reserve, and silence, and quiet, will occasionally prove great restoratives; but above all every effort should be made to raise their minds to a due sense of their situation and destiny, *as rational and immortal beings*; and to substitute the *godly* fear of

*doing wrong, for the slavish fear of punishment.”\**

If such be the high objects of the superintendents of prisons, how important is it to select proper persons to discharge the duties; and how unfit frequently are the dispositions and attainments of gaolers and governors of houses of correction! If there be any single maxim, applicable to this subject, worth repeating more frequently than another, it is, that prison discipline can only be obtained by insisting upon moral order. Walls and irons may restrain the offender, but it is the coercion of conscience, and a sense of right, that will certainly reform him. Gaolers in general are unfit to teach these lessons, because they have been selected as possessing qualifications of a very opposite kind. All this is but the machinery to hold the substance which requires to be annealed; and the annealer is the skilful teacher of morals and religion, possessing a peculiar turn of disposition, a thorough knowledge of human nature, and particularly of the springs which are likely to touch the heart and the affections.

Nor is the Ordinary, however desirous,

\* Roscoe on Penal Jurisprudence, p. 171.

competent to fulfil all the laborious engagements which devolve upon him in a large prison; and it too frequently happens, that the performance of his duties degenerates into inefficient formality. Gratuitous inspectors, as they are instigated by a tender regard to the unhappy sufferers, and are not appointed for interest or convenience, but solely for their fitness, are more likely to make an impression on the rude materials they have to work on, than the sound or accomplished scholar. Indeed it is to be lamented, that the Protestant religion, as established in this country, affords no clerical labourers, like the inferior Catholic clergy, adapted peculiarly for the roughest and rudest part of society.

The American penitentiaries, to which we have been taught to look as examples for our imitation, have exhibited the efficacy of gratuitous instruction. As long as the founders of these institutions were capable of discharging the duties of inspection and superintendance, all went on successfully; crimes were diminished almost to extinction; no convict was known to return a second time to these reformatory abodes; but the convicted seemed to be rendered better than

even many of the unconvicted, in consequence of the wholesome instruction and labour of which they were partakers. This was the state of things as long as Caleb Lownes, and Thomas Eddy, and Mr. Bradford retained the superintendance. Among other interesting matter contained in the Report of the Inspectors of the Philadelphian prison, in 1791, they remark, that " We have reason to congratulate our fellow citizens on the happy reformation of the present system. The prison is no longer a scene of debauchery, idleness, and profanity ; an epitome of human wretchedness ; a seminary of crimes destructive to society ; but a school of reformation, and a place of public labour. We hope by the blessing of Divine Providence, that the community of rational beings may be preserved, without the deplorable necessity of cutting off evil members by a sanguinary process, of exposing them on whipping-posts to the painful sympathy of the humane, and the barbarous mockery of brutal mobs. This hope is confirmed by the singular fact, that of the many who have received the governor's pardon, not one has been returned a convict."

How lamentably are these hopes frustrated by the Report of 1817. Here we find the ci-

tizens of Philadelphia lamenting, that the present state of the penitentiary affords a melancholy and striking contrast to the former representation. “The number of prisoners continues to encrease, so that from thirty to forty are obliged to be lodged in rooms of eighteen feet square. The innocent are thus intermixed with the guilty; the young offender, and often the disobedient servant or apprentice, with the most experienced and hardened culprit;” and they add pathetically, that “the institution already begins to assume, especially as respects untried prisoners, the character of an European prison, and a seminary for every vice; in which the unfortunate being, who commits a first offence, and knows none of the arts of methodized villainy, can scarcely avoid the contamination which leads to extreme depravity.”\* Of 451 convicts in the prison, 162 had been before convicted and pardoned; and in another case, of all that were committed for second and third offences, about two-thirds had been pardoned offenders. The New York and the Massachusett’s prisons, of which the particulars have been published, exhibit a similar unfortunate change.

\* Roscoe on Penal Jurisprudence, Appendix, p. 23.

The sources of these evils are stated by the Massachusett's Reporters to be the want of separation among the prisoners; the relaxation of the steady and strict discipline introduced and maintained by a respectable member of the society of Friends; and the injudicious use of the power of pardon.

After this unanswerable declaration, I hope I shall not be accused of uncharitableness if I insist, that no penitentiary system can be long successful, which does not provide, besides the proper officers to be paid by a salary, a class of visitors whose attendance shall be gratuitous, and who shall be prompted only by the desire of doing good; who will not labour merely for the sake of hire, but for the noble and animating end of redeeming men from the power of sin.

Among all the physical plans which have been proposed to accomplish this end, none seems so effectual as the division and sub-division of the offenders into classes. This is one of the secrets of the penitentiary system. In order to carry this into effect in the most complete manner, it has struck me, that a greater attention should be paid to the regulation that requires silence. If all oral

communication could be prevented, but just such as related to the business of the prison, the most perfect separation that can be imagined in such a place would be established. The success of a penitentiary may generally be estimated tolerably correct, by attending to the quietness or boisterousness of prison conversation. If such a plan could be effectually adopted, it would save a great expence in erecting separate work-rooms for each prisoner, or class of prisoners ; and it is the expence, I am afraid, that will prevent the system from being carried generally into effect. Silence was thought so highly of at the hospital of St. Michelle at Rome, that Mr. Howard relates, he saw fifty boys spinning in a room, in the middle of which was suspended in large letters of gold, the word SILENTIUM ; and it is no small recommendation of its efficacy, that the Friends adopt it as the chief means of managing and correcting their children.

But however defective the present state of our prisons may be, I must confess myself unable to come to the conclusion, at which many benevolent people have arrived, namely, that the encrease of crimes, which we now witness is chiefly to be attributed to the severe and

sanguinary nature of the penal code. This view of the case by no means corresponds with our experience in the country, where crimes are multiplied three-fold among those who were never the inmates of a prison. The increase, as far as my observation has extended, is attributable chiefly to the distresses of the lower orders, and to the vicious degradation into which they have generally sunk. Many of these distresses are occasioned by the artificial state of society in which we live;—a state in which support and competence are not always the reward of industry but of hazardous speculation; and where riches are frequently accumulated in consequence of our financial difficulties, thereby creating an unnatural circulating medium, and a class of usurious speculators unknown to any other age or country. Other causes of distress arise out of the diversion of capital embarked in particular trades during the war, which is an evil, we would hope, only of temporary inconvenience. But the predominating cause of all the mischief is the administration of the poor-laws, which, with the forced state of our manufactures, is sufficient to account for the superabundant population, which can never exceed the steady demand for labourers, and the capital which employs

them, without producing a great deal of misery. This cause alone is sufficient to account for the prostitution and the pilfering habits into which the poor have been betrayed. One vice introduces another. Poverty and want impel some, and afford a treacherous excuse to the rest, until the fabric of society is undermined, and its strongest and proud towers are tottering. It is some consolation, however, to know, and we have the best authority for the fact, that, taking into consideration the numerical additions to our population, the most atrocious crimes have not increased, and those offences which have increased do not proceed so much from malignity of heart, as from the habits which have grown out of the disordered and sophisticated state of society.

Nor will the views brought forward in the preceding pages lead us to the inference so decidedly and unanimously expressed by the "Society for the improvement of prison discipline, and the reformation of juvenile offenders," namely, that "the present alarming encrasshement of crimes arises more from the want of instruction, classification, regular employment, and inspection in jails, than from any other cause." But on the contrary, if we

consider this as the original cause of the mischief, I am persuaded that our exertions in behalf of society would terminate in disappointment, and we should have to begin our labours afresh with accumulated difficulties to contend with. Our labour would be as fruitless as if we should endeavour to prevent the ravages of a torrent by diverting it at its junction with the sea instead of cutting it off at its source. That incalculable good can be done by a proper attention to the internal management of prisons cannot be doubted, but we must not rely solely upon this. We must endeavour to prevent the causes, which bring mankind into such a situation as to require this species of discipline. Those causes, as was stated before, are chiefly to be referred to the complex and disordered state of our finances and pauper-regulations. If we rectify these, we shall cut off the mischief at its source.

But I am reminded by the length to which I have already drawn out my observations, that it is time to conclude; and, in order to do so, I will venture briefly to call the reader's attention to the leading thoughts in the discussion. In the first place, then, I rely with considerable confidence on the con-

nexion of the principles of Political Economy with Criminal Jurisprudence ; and on the truth so earnestly insisted on by the ancients, that true wisdom consists in following nature ;—not that, which propels us forward without regard to the means or to the end ; but that, which makes our actions consistent with conscience and reason, and which is conformable to the whole, and not to a limited part, of the nature of man. Such a guide needs no speculative innovations or hazardous experiments to be set on foot, but a gradual and careful revision of subsisting laws, so that the leading principles which promote the improvement of society may be left unimpaired, to accomplish all the purposes for which they are so wisely established. Such views as these, by pointing out how much may be safely altered, and how little would be gained by substituting new institutions without a precognition of their effect, should moderate the expectations of the too sanguine friends of reform, at the same time that it should allay the fears of its opponents. Other conclusions at which we have arrived are,—That the passions and affections constitute a part of our nature, and though liable to abuse, lead to the most beneficial consequences ; some of which we

have determined to be the protection and defence of our persons, characters and property, and the persons, characters, and property of others related to us:—That punishment, either retributive or exemplary, is not a justifiable end:—That legislators must take for their guide the principles which govern the relations of individuals; and that as protection and defence are the immediate objects of municipal law, all punishments that contradict or that do not correspond with these objects, are inexpedient and liable to be defeated:—That imprisonment, and its various modifications, promises the greatest conformity to these views, and contains within it the most desirable properties with the fewest objections, being conducive in an eminent manner to the reformation of the offender, and capable of being divided or remitted at pleasure:—That the law must always be an imperfect instrument of governing mankind, from the impossibility of constructing it so as to embrace all the combinations of moral actions; and that the only way to remedy this inconvenience is to enlarge its principles as the improvement of society shall enable us to do it, and to leave a large discretion to the administrators of justice: that the failure of imprisonment as a punishment is not to

be attributed to the misconduct of government or to the laws, so much as to the want of benevolent individuals among the people to carry the laws into effect; and, to adopt the sentiments of the Commissioners of the State of Massachusetts, addressed to the House of Representatives, March the 2d, 1818, that "constant employment, and the usual means of instruction in morality and religion, are ineffectual for the reformation of criminals, unless they are debarred from all intercourse. The natural effect of a state of society amongst them is so obviously to counteract the penitentiary discipline, and to cherish the corrupt dispositions, which form the bond of union, and the basis of all sympathy amongst this class of men, that the establishment which admits of this indulgence, may, with strict propriety, be called a *school of vice.*" A steady and strict moral discipline is absolutely essential to any penitentiary system.

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## **APPENDIX.**

**NOTES  
AND  
ILLUSTRATIONS.**

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## APPENDIX.



### NOTE (A) p. 25.

THE course of nature with regard to mankind is no more unaccountable or accidental than we witness in the rest of creation. The wicked are but the brambles and briars, and obnoxious weeds of the vegetable world—the hateful and ravenous animals, the use of which we cannot ascertain. We do not consider it to be necessary to vindicate the providence of God in creating such a superfluity of animals and of plants, many of which, on account of this arrangement, perish before they seem to have answered any end. Almost all vegetables produce a vast proportion of seeds, the greater part of which perish, or are lost; and in some instances, not one in a myriad grows up to maturity. M. Dodart computes that an elm every year, upon an average, produces 390,000 seeds, and, therefore, supposing it to live one hundred years, thirty-three millions during its whole age. Fern is infinitely more fruitful. A single plant of hart's-tongue, as Dr. Green calculates, produces in a year a million of seeds. A spider lays, as naturalists inform us, five or six hundred eggs. The prevalence of delinquency is not

more unaccountable than these facts. "That the present world," says Bishop Butler, "does not actually become a state of moral discipline to many, even the generality; cannot be urged as a proof that it was not intended for moral discipline, by any who at all observe the analogy of nature. For of the numerous seeds of vegetables and bodies of animals which are adapted and put in the way to improve to such a point or state of natural maturity and perfection, we do not see perhaps one in a million actually to improve to it. Far the greatest part of them decay before they are improved to it; and appear to be absolutely destroyed.—I cannot forbear adding, that the appearance of such an amazing waste in nature, with respect to these seeds and bodies, by foreign causes, is to us as unaccountable as what is much more terrible, the present and future ruin of so many moral agents, by themselves, i. e. vice."—*Analogy, Part I. c. 5.*

#### NOTE (B) p. 70.

"Upon every wrong, reason and experience make us apprehend the resentment of the person injured: but the horror of mind which accompanies every gross crime, produceth in the criminal an impression that all nature is in arms against him. Conscious of meriting the highest punishment, he dreads it from the hand of God and from the hand of man. "And Cain said unto the Lord, my punishment is greater than I can bear. Behold thou hast driven me out this day from the face of the earth: and from thy face shall I be hid, and I shall be a fugitive and a vagabond in the earth, and it shall come to pass that every one

that findeth me, shall slay me."\* Hence the efficacy of human punishments in particular, to which man is adapted with wonderful foresight, through the consciousness of their being justly inflicted, not only by the person injured, but by the magistrate or by any one. Abstracting from this consciousness, the most frequent instances of chastising criminals, would readily be misapprehended for so many acts of violence and oppression, the effects of malice even in judges; and much more so in the party offended, where the punishment is inflicted by him. The purposes of nature are not any where left imperfect. Corresponding to the dread of punishment, is, first, the indignation we have at gross crimes, even when we suffer not by them; and next, resentment in the person injured, even for the slightest crime; by which sufficient provision is made for inflicting the punishment that is dreaded. No passion is more keen or fierce than resentment; which, at the same time, when confined within due bounds, is authorized by conscience. The delinquent is sensible that he may be justly punished; and if any person, preferably to others, be intitled to inflict the punishment, it must be the person injured.

— But at the tyrant's name,  
My rage rekindles, and my soul's on flame;  
'Tis just resentment, and becomes the brave;  
Disgrac'd, dishonour'd, like the vilest slave.

*Iliad*, ix. 759.

Revenge, therefore, when provoked by injury or voluntary wrong, is a privilege that belongs to every

\* Genesis chap. iv. ver. 13, 14.

person by the law of nature; for we have no criterion of right or wrong more illustrious than the approbation or disapprobation of conscience. And thus the first law of nature regarding society, that of abstaining from injuring others, is enforced by the most efficacious sanctions.

An author of the first rank for genius as well as blood, expresses himself with great propriety upon this subject. "There is another passion very different from that of fear, and which, in a certain degree, is equally preservative to us, and conducing to our safety. As that is serviceable in prompting us to shun danger, so is this in fortifying us against it, and enabling us to repel injury and resist violence when offered. 'Tis by this passion that one creature offering violence to another, is deterred from the execution; whilst he observes how the tempt affects his fellow, and knows by the very signs which accompany this rising motion, that if the jury be carried further, it will not pass easily, or with impunity. 'Tis this passion withal, which, after violence and hostility executed, rouses a creature in opposition, and assists him in returning like hostility and harm on the invader. For thus as rage and despair encrease, a creature grows still more terrible, and, being urged to the greatest extremity, finds a degree of strength and boldness unexperienced till then, and which had never risen except through the height of provocation."\*

But a cursory view of this remarkable passion is

\* *Characteristics*, Vol. II. p. 144.

not sufficient. It will be seen by and by, that the criminal law in all nations is entirely founded upon it; and for that reason it ought to be examined with the utmost accuracy. Resentment is raised in different degrees, according to the sense one hath of the injury. An injury done to a man himself, provokes resentment in the highest degree. An injury of the same kind done to a friend or relation, raises resentment in a lower degree; and the passion becomes gradually fainter, in proportion to the slightness of the connection. This difference is not the result of any peculiarity in the nature of the passion. It is occasioned by a principle inherent in all sensible beings, that every one has the strongest sense of what touches itself. Thus a man hath a more lively sense of a kindness done to himself, than to his friend; and the passion of gratitude corresponds in degree to the sensation. In the same manner an injury done to myself, to my child, or to my friend, makes a greater figure in my mind, than when done to others in whom I am less interested.

Every heinous transgression of the law of nature, raiseth indignation in all, and a keen desire to have the criminal brought to condign punishment. Slighter delinquencies are less regarded. A slight injury done to a stranger, with whom we have no connection, raiseth our indignation, it is true, but so faintly as not to prompt any degree of revenge. The passion in this case, being quiescent, vanisheth in a moment. But a man's resentment for an injury done to himself, or to one with whom he is connected, is an active passion, which is gratified by punishing the delinquent in

a measure corresponding to the injury. And it must be remarked, that many circumstances must concur before this passion be fully gratified. It is not satisfied with the suffering merely of the criminal. The person injured must inflict the punishment, or at least direct it; and the criminal must be made sensible, not only that he is punished for his crime, but that the punishment proceeds from the person injured. When all these circumstances concur, and not otherwise, the passion is fully gratified; and commonly vanisheth as if it had never been. Racine understood the nature of this passion, and paints it with great accuracy in the following scene.

## CLEONE.

*Vous-vous perdez, Madame. Et vous devez songer.—*

## HERMIONE.

*Que je me perde, ou non, je songe à me venger.  
Je ne sai même encor, quoi qu'il m'ait pu promettre,  
Sur d'autres que sur moi, si je dois, m'en remettre.  
Pyrrhus n'est pas coupable à ses yeux comme aux miens,  
Et je tiendrois mes coups bien plus surs que les siens.  
Quel plaisir, de venger moi-même mon injure;  
De retirer mon bras teint du sang du Parjure;  
Et pour rendre sa peine & mes plaisirs plus grands,  
De cacher ma rivale à ses regards mourans!  
Ah! si du-moins Oreste, en punissant son crime,  
Lai laissoit le regret de mourir ma victime!  
Va le trouver. Dis-lui qu'il aprenne à l'Ingrat,  
Qu'on l'immole à ma haine, & non pas à l'Etat.  
Chére Cléone, cours. Ma vengeance est perdue,  
S'il ignore. en mourant, que c'est moi qui le tue.*

*Andromaque, Act iv. Sc. 4.*

Though injury, or voluntary wrong, is generally the cause of resentment, we find by experience, that sud-

den pain is sufficient sometimes to raise this passion, even where injury is not intended. If a man wound me by accident in a tender part, the sudden anguish, giving no time for reflection, provokes resentment, which is as suddenly exerted upon the involuntary cause. Treading upon a gouty toe, or breaking a favourite vase, may upon a warm temper produce this effect. The mind engrossed by bodily pain, or any pain which raises bad humour, demands an object for its resentment; and what object so ready as the person who was the occasion of the pain, though without design? In the same manner, even a stock or a stone becomes sometimes the object of resentment. If accidentally striking my foot against a stone, a smart pain ensues, resentment discovers itself at once, which prompts me to bray the stone to pieces. The passion is still more irregular in a losing gamester, when he vents it on the cards and dice. All that can be said, as an apology for such absurd fits of passion, is, that they are but momentary, and vanish upon the first reflection. And yet such indulgence was by the Athenians given to this irrational emotion, that if a man was killed by the fall of a stone, or other accident, the instrument of death was destroyed.\* †Resent-

b

\* *Meursis de leg. Atticis, L. I. c. 17.*

† The *Actio Noxalis* among the Romans, founded also upon the privilege of resentment, appears not altogether void of reason. Animals, it was thought, were not to be exempted from punishment more than men; and when a domestic animal did mischief contrary to its nature, the law required that it should be given up to the person who was hurt, in order to be punished. To make this law effectual the *Actio Noxalis* was given, which followed the animal, though even in

ment raised by voluntary wrong, which is a rational and useful passion, is in a very different condition. It subsists till the sense of the injury be done away, by punishment, atonement, or length of time.

**NOTE (C) p. 79.**

**" Experience diminishes the influence of passive impressions on the mind, but strengthens our active**

**the hands of a purchaser *bona fide*.\* So far it was well judged, that property should yield to the more essential right of self-preservation, and to the privilege of punishing injuries. It is probable that originally there was a necessity to deliver the animal to punishment, without admitting any alternative. But afterwards, when the passions of men were more under subjection, and the connection of property became more vigorous, which last will be the subject of a following discourse, an alternative was indulged to the defendant to repair the damage, if he chose rather to be at that expence than to surrender his animal.† Among modern nations, in Scotland at least, this action went into disuse with the privilege of private punishment. As at present it belongs to the magistrate only to inflict punishment, the mischief done by irrational animals is not otherwise regarded, than as a reason for preventing the like mischief in time coming. The satisfaction of private revenge is quite disregarded.**

**ULPIAN** seems not to have understood the nature or foundation of the *Actio Noxalis*, in teaching the following doctrine, That the proprietor is primarily liable to repair the mischief done by his animal, and that the alternative of delivering up the animal was afterwards indulged by the law of the Twelve Tables :‡ The law of nature subjects no man to repair the mischief done by his horse or his ox, if not antecedently known to be vicious. All that can be incumbent upon him, by any rational principle, is to deliver up the animal to be punished ; and hence it is evident that the privilege indulged by law was not that of giving up the animal, but that of retaining it upon repairing the damage.

\* Sect. 5. Inst. de Noxal. Action.

† L. 1. pr. D. si quadrupes pauperiem fecisse dicatur.

‡ L. 6. § 1. de re judicata.

principles. A course of debauchery deadens the sense of pleasure, but increases the desire of gratification. An immoderate use of strong liquors destroys the sensibility of the palate, but strengthens the habit of intemperance. The enjoyment we derive from any favourite pursuit gradually decays as we advance in years: and yet we continue to prosecute our favourite pursuits with increasing steadiness and vigour. On these two laws of our nature is founded our capacity of moral improvement. In proportion as we are accustomed to obey our sense of duty, the influence of the temptations to vice is diminished, while, at the same time, our own habit of virtuous conduct is confirmed. How many passive impressions, for instance, must be overcome, before the virtue of beneficence can exert itself uniformly and habitually! How many circumstances are there in the distresses of others, which have a tendency to alienate our hearts from them and which prompt us to withdraw from the sight of the miserable. The impressions we receive from these are unfavourable to virtue: their force, however, every day diminishes, and it may, perhaps, by perseverance be wholly destroyed. It is thus that the character of the beneficent man is formed. The passive impressions which he felt originally, and which counteracted his sense of duty, have lost their influence, and a habit of beneficence is become part of his nature." *Stewart's Philosophy of the Human Mind*, Vol. I. p. 524. 8vo. ed. See also to the same effect *Butler's Analogy*, Part I. c. 5.

## NOTE (D) p. 109.

"It has been shewn, without any reference having

hitherto been made to the holy Scriptures, that all men are naturally possessed of certain rights ; and further, that an attack on the rights of another would be a sin against God, and an act of injustice to the sufferer.

“ This will be confessed. But perhaps it may be alleged, that these considerations alone do not prove our actual right of opposing by force any such attack. The right of repelling aggression by the use of violence has been conceived by many Christians to be prohibited in the Scriptures. Others may regard it as unsupported by the dictates of natural reason. They may assert, that to restrain the freedom, and, much more, to bring into hazard the life of another, though an aggressor, may be a line of conduct equally unauthorised with his own : that, supposing this to be the case, his guilt will be no justification of ours : that we may have no more right to kill an assassin than we have to destroy an infectious person, who might prove equally fatal to us : that although we must lament the approach of either as a severe misfortune, justice may, nevertheless, require that, if we cannot avoid the impending danger, we should patiently submit the event to God, and leave to him the punishment of the offender, and the vindication of his own authority.

“ This fundamental objection to the right of self-defence is not to be obviated merely by urging that the destruction of the human race would probably be the ultimate consequence of admitting it. We are not allowed to oppose our ideas of future consequences to the direct authority of God. It has been proved that

every man has originally that authority for the quiet enjoyment of the gifts bestowed upon him ; and he may justly require us to produce authority equally direct, before we presume forcibly to interfere with them.

“ In reply then it may be observed, that to make the case of the infectious person parallel to that of the assassin, the former ought to have been represented as wilfully attempting to injure our health. Otherwise, he cannot be said to make an attack on the gifts which God has conferred on another. Of course the instance alleged can throw no light on the question, whether a person making such an attack may justly be resisted by force. A proof, however, of the irrelevance of a particular example does not invalidate the principle which it was intended to illustrate. The subsequent remarks, it is apprehended, afford a direct answer to the doubts expressed in the objection, and supply the proof which is required.

“ It has been shewn that the various bodily and mental powers possessed by each individual are the gifts of God ; and further, that they are all bestowed for important purposes. Now among these powers are some, which the possessor may have clearly perceived to be calculated for the defence and preservation of the rest. He has already had sufficient grounds to conclude that the Almighty wills him to protect himself, by the use of such of the gifts conferred upon him as are applicable to the end in view, from the injurious effects of hunger, of thirst, and of inclement seasons. It is obvious, that in consequence of finding himself

endowed by his Maker with powers capable of repelling injuries of other kinds, and impressed with an instinctive aversion to every sort of pain, he has equally substantial grounds for concluding himself authorised to resist injuries in general, by the use of such apposite means of defence as are bestowed on him. In other words, he may conclude, that for important purposes he is invested with a right, subject to such limitations as the original donor shall have already annexed, or shall hereafter, at any time, think fit to impose, to employ the powers of which he is possessed in defending himself against every kind of injury; whether it be likely to arise from famine or from nakedness, from the violence of a savage animal, or from the unwarranted attacks of a savage of his own species. And since he can in no case defend the divine gifts committed to his charge, without depriving the aggressor of some of his natural powers, or restraining him in the use of them: the arguments, which justify him in defending himself against an unauthorised attack, evidently justify such deprivation or restraint, as far as may be necessary for his defence.

“ He, therefore, who, by invading the rights of another, has met with resistance, and has thereby lost any of the gifts conferred upon him, his property, his health, his limbs, or his life, must impute the loss wholly to himself. He runs upon a weapon pointed against him by the hand of God. And the detriment which he receives is to be viewed in the same light as if it had been incurred by means of any other incident, which, by the appointment of God, is attended with painful or destructive consequences.

“ To the preceding observations some important inferences may be subjoined.

“ First, The reasons, which prove that men are authorised by the will of God to resist an assailant, apply equally to the cases of open violence, and of secret fraud. Whether the aggressor be an avowed enemy, or a pretended friend; whether he attempt in the face of day to assassinate his neighbour, or by stealth to mingle poison with his food; the latter equally sustains an invasion of his rights, and is equally entitled to repel it by force.

“ Secondly, The same reasons, which prove that men are authorised by the will of God to defend their rights when actually attacked, equally prove them to be authorised, when they are sufficiently assured that an attack is intended by another, to lay such previous restraints on him as are necessary to prevent it; and to continue them so long as that necessity subsists.

“ Thirdly, The same reasons likewise justify a man in taking all forcible methods, which are necessary in order to procure the restitution of the freedom or the property, of which he had been unjustly deprived: such methods being only a continuation of the resistance which was made, or an exertion of that which might have been made, to the original attack. And they equally justify the force necessary for obtaining what is analogous to restitution, an equitable indemnification for such rights as cannot be restored.

“ Fourthly, They apply equally to the defence and

-recovery of all the actual rights of men, whether originally received from God, or obtained by their own exertions ; or acquired, as it will hereafter be shewn that rights may be acquired, by the assistance and consent of others.

“ **Lastly, They do not authorise any manner of resistance or force beyond that which is necessary to secure men from the effect of the injustice offered to them, or impending over them.**”—*Gisborne's Moral Philosophy*, p. 117, *et seq.*

NOTE (E.) p. 121.

“ See the trial of Jane Wenman, for witchcraft, before Mr. Justice Powell, at Hereford, on March 12th, 1711—12; and Arnot's Criminal Trial in Scotland, p. 369.

The 9th of George the IIInd. (cap. 5,) has put an end to all the executions for what Blackstone (Comment iv. 61,) calls a dubious crime. It is said, this Act passed in consequence of an old woman's being drowned at Tring, by her too credulous neighbours, who suspected her of witchcraft. In Ireland there is still a statute, inflicting capital punishment upon witches, unrepealed. It was passed in the 28th Eliz. and describes every species of the crime as minutely as the English statute: and even provides for the trial of peers, who might happen to be charged with the crime.—See Christian's Blackstone, iv. 61. note; and Ld. Mountm. Hist. of Irish Parl.

The Scotch law against witches is still seyerer than

the English. It subjects both the witch and her consuler to the penalty of death. The Act is but a short one; and as the collection of Scotch Laws is become a scarce book, I think the curious reader will be gratified with a sight of it. It passed in Mary's ninth Parliament, held in 1563, and probably suggested the English Act to her superstitious son.

“Item, For-sa-meikle as the Queenis Majestie and  
“ the Three Estaites in this present parliament, being  
“ informed that the heavie and abominable supersti-  
“ tion used by diverse of the lieges of this realme, be  
“ using of witchcraftes, sorcerie, and necromancie,  
“ and credence given thereto in times by-gane, against  
“ the law of God; and for avoyding and away-putting  
“ of all sik vaine superstition in times to-cum, it is  
“ statute and ordained by the Queenis Majestie, and  
“ the Three Estaites foresaidis, that na maner of per-  
“ son nor personnes, of quhat-sum-ever estate, de-  
“ gree, or condition they be of, take upon hand, in  
“ onie times hereafter, to use onie maner of witch-  
“ craftes, sorcerie or necromancie, nor give them-  
“ selves furth to have onie sik craft or knawledge  
“ theirof, their-throw abusand the people: nor that  
“ na persoun seik onie helpe, response or consulta-  
“ tion at onie sik users or abusers foresaidis of witch-  
“ craftes, sorceries, or necromancies, under the paine  
“ of death, asweil to be execute against the user,  
“ abuser, as the seiker of the response or consulta-  
“ tion. And this to be put to execution by the jus-  
“ tice, schireffis, stewards, baillies, lordes of regali-  
“ ties and royalties, their deputes, and uthers ordinar  
“ judges competent within this realme, with all ri-

"gour, having power to execute the samin."—Scottish Acts, ed. 1682, i. 321.—*Eden on the Poor*, Vol. 5. p. 147.

NOTE (F) p. 122.

"There is perhaps no instance in which the difference between our law in its solemn denunciations and its actual practice is more remarkable than in the crime of high treason. Although the sentence uniformly pronounced by the judge, is one which it is never intended should be executed, it is still suffered to remain a part of our law. It remains a just subject of reproach to us by foreigners, and answering amongst ourselves no other purpose than at a very awful moment, to distract the reason, and terrify the imagination of each miserable convict by an enumeration of horrible barbarities, which with judicial and religious solemnity he is told that he is to undergo. He is to be drawn to the place of execution, and there to be hanged, but not till he is dead; he is to be cut down and his entrails taken out, and burned while he is yet alive. His head is then to be cut off, and his body is to be divided into four quarters, and to be at the king's disposal. Here there is no discretion reposed in the judges, they are bound to pronounce this cruel and disgusting sentence, and all discretion is transferred to the executioner. He is allowed if he thinks fit to defeat the intention of the law, by suffering the criminal to remain suspended till he is dead; he may if such be his pleasure omit the embowelling altogether; and it is to the humanity of the hangman that it is left to temper the savage severity of the law. That humanity however has not been always exerted, "there are few instances," says Mr. J. Black-

stone, *Com.* vol. iv. p. 377, “ and those accidental or “ by negligence, of persons being disembowelled till pre- “ viously deprived of sensation by strangling.” There are few instances, but there are some. It depends therefore not on the aggravation to be found in the guilt of the offender, but on accident, or on the neglect of a man who executes the sentence, whether severe torture shall constitute part of the punishment. Nor in truth has it always been through accident or negligence that those tortures have been endured. It should seem that in ancient times the sentence was usually executed in all its rigour; it has been so at no very remote period, no further indeed back than the rebellion of 1745: and recourse will probably again be had to these severities if the violence and bitterness of civil dissensions and intestine wars should ever again unhappily rage in this country, and be attended with the same effect as they have produced in past times, and amongst other nations, that of kindling every latent spark of revenge and cruelty existing in the human breast.”—*Romilly's Observations*, p. 97.

## NOTE (G) p. 124.

“ *Crimes punishable by the deprivation of life; and where, upon the conviction of the offenders, the sentence of death must be pronounced by the judge.—Of these, it has been stated, the whole, on the authority of Sir William Blackstone, including all the various shades of the same offence, is about 160 in number.*

“ *The principal are the following:*

“ *Arson, or wilfully and maliciously burning a house, barns with corn, &c.*  
*Attempting to kill privy counsellors, &c.*

Bankrupts not surrendering, or concealing their effects.  
Being accessories to felonies deemed capital.  
Breaking down the head of a fish-pond, whereby fish  
may be lost. (*Black Act.*)  
Burglary, or house-breaking in the night time.  
Challenging jurors above 20 in capital felonies; or  
standing mute.  
Concealing the death of a bastard child.  
Cottons, selling with forged stamps.  
Cutting down trees in an avenue, garden, &c.  
Cutting down river, or sea banks.  
Cutting hop binds.  
Destroying ships, or setting them on fire.  
Destroying silk or velvet in the loom; or the tools for  
manufacturing thereof; or destroying woollen goods,  
racks, or tools, or entering a house for that purpose.  
Deer-stealing, second offence; or even first offence,  
under *Black Act*, not usually enforced.  
Destroying turnpikes or bridges, gates, weighing en-  
gines, locks, sluices, engines for draining marshes,  
&c.  
Escape by breaking prison in certain cases.  
Forgery of deeds, bonds, bills, notes, public securities,  
&c. &c. Clerks of the Bank embezzling notes, al-  
tering dividend warrants; paper makers, unautho-  
rized, using moulds for notes, &c.  
Government stores, embezzling, burning or destroy-  
ing in dock-yards; in certain cases.  
Highway robbery.  
House breaking in the day time.  
Maiming or killing cattle maliciously, *See the Black*  
*Act. 9 Geo. I. cap. 22.*

**Maliciously maiming or disfiguring any person, &c.  
lying in wait for the purpose.**

**Mutiny, desertion, &c. by the martial and statute law.**

**Murder.**

**Personating bail, or acknowledging fines, or judgments in another's name.**

**Piracy, or robbing ships and vessels at sea; under which is included, the offences of sailors forcibly hindering their captains from fighting.**

**Prisoners under insolvent acts, guilty of perjury.**

**Privately stealing, or picking pockets, above one shilling.**

**Pulling down houses, churches, &c.**

**Rape, or the forcible violation of chastity.**

**Returning from transportation, or being at large in the kingdom after sentence.**

**Riots by twelve or more, and not dispersing in an hour after proclamation.**

**Robbery of the mail.**

**Sacrilege.**

**Setting fire to coal mines.**

**Servants purloining their master's goods, value 40s.**

**Sending threatening letters (Black Act).**

**Shooting at a revenue officer; or at any other person,  
See the Black Act.**

**Shop-lifting above five shillings.**

**Smuggling by persons armed; or assembling armed for that purpose.**

**Sodomy, a crime against nature, committed either with man or beast.**

**Soldiers or sailors enlisting into foreign service.**

**Stealing an heiress.**

**Stealing bonds, bills, or bank notes.**

Stealing bank notes, or bills from letters.

Stealing above 40s, in any house.

Stealing above 40s. on a river.

Stealing linen, &c. from bleaching grounds, &c. or destroying linen therein.

Stealing horses, cattle, or sheep.

Stabbing a person unarmed, or not having a weapon drawn, if he die in six months.

Stealing woollen cloths from tenter grounds.

Stealing from a ship in distress.

Taking a reward for helping another to stolen goods, in certain cases.

Treason, and petty treason. Under the former of these is included the offence of counterfeiting the gold and silver coin.

Uttering counterfeit money, third offence."—*Colquhoun, published in 1800.*

NOTE (H) p. 148.

"But when the care of the public safety is entrusted to men, whose authority over their fellow creatures is limited by defects of power and knowledge; from whose utmost vigilance and sagacity the greatest offenders often lie hid; whose wisest precautions and speediest pursuit may be eluded by artifice or concealment; a different necessity, a new rule of proceeding, results from the very imperfection of their faculties. In their hands the uncertainty of punishment must be compensated by the severity. The ease with which crimes are committed or concealed, must be counteracted by additional penalties and increased terrors. The very end for which human government is established, requires that its regulations be adapted

to the suppression of crimes. This end, whatever it may do in the plans of infinite wisdom, does not, in the designation of temporal penalties, always coincide with the proportionate punishment of guilt."—*Moral and Political Philosophy*, b. vi. c. 9.

NOTE (I) p. 155.

"If any offence existed," said Mr. Whitbread on Sir Samuel Romilly's bill for preventing larceny from dwelling-houses, "a member of parliament had only to apply to this house, and the sledge-hammer was instantly held over the offender. We remember the story, that a bill was proposed to make it a capital offence for a Jew to look down an area; which was gravely approved with an amendment, by the introduction of the words 'or others' after the word Jew."

NOTE (K) p. 175.

"Not a great many years ago, upon the Norfolk circuit, a larceny was committed by two men in a poultry yard, but only one of them was apprehended; the other having escaped into a distant part of the country, had eluded all pursuit. At the next assizes the apprehended thief was tried and convicted; but Lord Loughborough, before whom he was tried, thinking the offence a very slight one, sentenced him only to a few months imprisonment. The news of this sentence having reached the accomplice in his retreat, he immediately returned, and surrendered himself to take his trial at the next assizes. The next assizes came; but, unfortunately for the prisoner, it was a different judge who presided; and still more unfortunately, Mr. Justice Gould, who happened to

be the judge, though of a very mild and indulgent disposition, had observed, or thought he had observed, that men who set out with stealing fowls, generally end by committing the most atrocious crimes; and building a sort of system upon this observation, had made it a rule to punish this offence with very great severity, and he accordingly, to the great astonishment of this unhappy man, sentenced him to be transported. While one was taking his departure for Botany Bay, the term of the other's imprisonment had expired; and what must have been the notions which that little public, who witnessed and compared these two examples, formed of our system of criminal jurisprudence."—*Romilly's Observations*, p. 18.

#### NOTE (L) p. 219.

"1<sup>o</sup>. L'emprisonnement est très-efficace par rapport au *pouvoir de nuire*. L'homme le plus dangereux pour la société cesse de l'être tant que sa détention continue. Il peut conserver toutes ses inclinations malfaisantes, mais il ne peut plus s'y livrer.

"2<sup>o</sup>. Sous le rapport du *profit*, tous les inconveniens de l'emprisonnement sont improductifs. C'est même une objection contre ce genre de peine que la dépense qu'il entraîne pour le maintien des prisonniers. Et dans ce calcul de perte, il ne faut pas oublier celle qui résulte de la suspension des travaux pour ceux qui ont une industrie lucrative: perte qui s'étend souvent au-delà même du terme de la détention, par les habitudes d'oisiveté qu'ils ont dû naturellement contracter.

Cette objection tombe d'elle-même dans le plan de prison panoptique, proposé dans le chap. XII.

“3°. *Sous la rapport de l'égalité*, cette peine est évidemment très-défectueuse ; il suffit, pour s'en convaincre de parcourir le catalogue des privations dont elle est composée. L'inégalité est au plus haut degré pour un valétudinaire, et pour un homme robuste—pour le père de famille, et pour celui qui ne tient à rien dans le monde—pour le riche accoutumé à toutes les jouissances de la société, et pour l'homme dont l'état habituel est un état de misère.

“4°. *Divisible*.—Cette peine l'est éminemment sous le rapport de la durée. Elle est aussi très-susceptible de différens degrés de sévérité.

“5°. *Exemplaire*.—Dans le système actuel des prisons, l'avantage de l'exemple est réduit à peu de chose. Dans le panoptique, la facilité donnée à l'admission du public ajouteroit beaucoup à cette branche d'utilité.

“6°. *Simplicité de description*.—Sous ce rapport, rien à désirer. La peine est à la portée de tous le degrés d'intelligence et de tous les âges. Le confinement est un mal dont tout le monde a l'idée, et plus ou moins l'expérience. Le seul mot *prison* rappelle donc toutes les idées pénales qui lui sont propres.”—*Théorie des Peines & Recompenses*, Tom. I. p. 119—122.

## NOTE (M) p. 220.

*A Letter written by Dr. Forde, the ordinary of Newgate.\**

SIR,

My opinion on the efficacy of executions, can but be of little service to one, who has, perhaps, studied such matters for a considerable length of time, for the purpose of endeavouring at a reformation in them ; whereas I have only viewed them as they occurred in the course of my professional attendance, without expecting that my opinion was ever likely to be *enquired* into, much less *followed*. From every thing I have witnessed on these melancholy occasions, I am *decidedly* clear, that executions, managed as they are at present, answer no end, whatsoever, either for *punishment* or *example*. By executions the intention of punishment is defeated ; which is, 1st, to make restoration, or recompence, to the injured party ; 2d, to warn others ; or, 3d, to amend the morals of the criminal. If I am plundered, 1st, the death of the plunderer may gratify my resentment, but it cannot restore my property ; for the law gives the property found upon the criminal, not to him who has *lost* it, but to the king. Whenever I can find that the numbers in the Newgate Kalendar are *decreased*, regularly, till at length the court at the Old Bailey is no longer of use—then, and not till then, I shall acknowledge, 2d, *utility* of executions for *intimidating* would-be rogues. With respect to the 3d point, (amendment

\* Written in the year 1783, in answer to an application made by Mr. Bentham.

of morals,) the rope puts a stop to every thing of that sort at once. But you may wish to learn the *effect*, which sentence of death has on the convict, in punishing his misdeeds, or causing him to set about the necessary work of *repentance*. From the moment he quits the court, every engine is set to work, both by him and his friends, to obtain a respite. During these exertions, vain and futile are all the attempts of the Ordinary, &c. to prevail on him to reflect on his awful situation, with respect to *both* worlds. The flattering hopes within his own breast are puffed up by his friends, into a *certainty* of saving his life; and till the very moment in which the unexpected warrant for execution arrives, *death* is the *farthest* thing from his thoughts. What is to be done now? are a few days sufficient to make his peace with God? Oh no! All is now hurry, confusion, and despair. Is this a time to instruct him in religion? Alas, he does not, perhaps, know the meaning of the word; nor does he conceive any benefit whatsoever to arise from the use of the name of a God, or a Saviour, except that of filling up his common conversation by explanatory blasphemy. To divert him now from any *serious* thoughts, he is *daily* visited by his *supposed* friends, relations, or colleagues; who, (some with *good* motives, and some with *bad*) are urging him to die like a man; and in order to assist him in keeping up his spirits, each visitor brings a little something for a parting-glass, which frequently terminates in the intoxication of the unfortunate sufferer, and precludes even the shadow of *repentance*, or *contrition*. Here you will be likely to attach blame to the prison-keepers for suffering liquors to be brought in; but what can they do?

Women, who are chiefly the conveyors of them, conceal them in such ways as would be termed the grossest insult to search for. Besides, common humanity says, “as he has only a few days to live, why add torture to torture, by keeping from him the consolation of his relatives?” &c. The result of all this (I speak generally) is *stupidity* at the hours of *morning*-devotion, enthusiasm, rhodomontade, and fruitless threats of revenge against his prosecutor, in the *evening*. At length the long-dreaded morning arrives; he knows he *must* quit this world, and he may as well do so with a *good* grace as not. “What would his old associates say, if they were to behold him die *soft*? (as their phrase is.) His memory would be despised, and had in abomination.” He mounts the drop, resolute to appearance, however he may be *within*—bows to the spectators—shakes hands with the Ordinary, and such others as may be travelling the same journey; and (according to the expression in the dying-speech, which at this moment is publishing in all parts of London) “is launched into eternity.”—This man is not *punished*, nor are his *compeers intimidated*.—It is like the acting of a tragedy: a momentary tear of pity *may* be shed; but the next ribaldry obliterates the whole of the foregoing catastrophe.

“For argument sake, we will suppose the convict a *true penitent* and resigned to his fate, with a full trust in, or even a modest hope of salvation. The spectators are ignorant of what is passing in his mind, but they see his *resignation* in his countenance; consequently they are not intimidated by his example. We will suppose again, that some *real* contrition *may*

arise in the breasts of some few who are under sentence; and they have deceived *me* as well as *themselves*. Let a *respite* come to these people who had given such hopes of reformation, and what is the consequence? I do not, at this moment, recollect one, who did not, *almost immediately*, forget all his good resolutions. Nay, I will take upon me to say, that some of the most wicked prisoners who are *now* in Newgate have been under sentence of death. One instance let me mention, of a man who was in that predicament, and who gave *every* hope of reformation. It was an arduous matter to get him respited; but it was done. He was removed from the cells and his punishment mitigated to transportation. Meeting me a few days afterwards, he said, “Here are the books you so kindly lent me; *and having no further use for them*, I return them with many thanks.”—But I ask, “Why execute all?” Who shall say that the *most hardened villain* may not repent! Youth, health, ignorance, bad companions, &c. may lead a man to perpetrate the greatest crimes. The time, however, *may* come, when he looks back with horror on his past transgressions, and repents in dust and ashes. *Execute* him, and think of his hope of salvation? Why not leave him to God and his own conscience? Time, confinement, mortification, &c. may restore him, and cause “joy in heaven:”—regular labour,—the sweets arising from industry,—the want of bad companions, &c. all combine to recover the lost sheep, and “the *last* state of that man is better than the *first*.” Who is he now that can take upon himself to determine, that it would have been better to put that man out of the world? I say, it is arrogating an authority

which no frail mortal has a right to do. Some persons (who think they abound with the milk of human kindness) will say, "I would punish no criminals with death, except they had committed *murder*, but that 'blood requires blood'—" "Whoso sheddeth man's blood," &c. (Gen. ix. 6.) This, however, was not used by the Almighty, on a *particular* case; but as a *descriptive threatening*. In the case of Abel's murder, (Gen. iv. 10.) instead of Cain being instantly punished with *death*, God says, "The voice of thy brother's blood crieth unto me from the ground." What infliction, then, is passed upon him? God says, (verse 12.) "When thou tillest the ground, it shall not yield unto thee her strength. A fugitive and a vagabond shalt thou be in the earth." This seems more like sentence of *transportation* than sentence of *death*. The result of that first murder is this, that God himself sets a mark upon Cain, lest any one should *attempt to kill him*. (ver. 15.) This then is no *sanction for our executions*. We well know, that previous to the French revolution, all robbers as well as *murderers* were punished with *death*, being previously *broken upon the wheel*. The consequence of which was, that very few robberies were committed, without being attended with *murder*. Whereas, the mildness and uncertainty of *our punishments* are the reason why so very few murders are perpetrated among us.—In short, when the criminal is *dead*, both the crime and the punishment are soon forgotten: let him *live and labour*, and the public may benefit by his *example*: whilst he himself is making some atonement for his crimes by his industry, and humbly endeavouring to make his peace with God. I have often reflected, and

as often wondered, with what small degree of devotion or right frame of mind, certain persons have joined in the second prayer in our church service, " Almighty God, who desireth not the *death* of a sinner, but rather that he may turn from his wickedness, and *live* :" strange it is, that our RELIGION is so mild, and our LAWS so sanguinary ! Instead of sparing the life of a criminal in order that he may *turn from his wickedness* and try to live for *ever*, our criminal code nips him in the first bud of his sin, cutting off all hope of reformation, and destroying the possibility of atonement to the injured party.—I hear some one say, " What is to be done with criminals ? would you execute *none* ?"— *None* : square the punishment to the several degrees of transgression, and plead the mild laws of God in your favour.

**B. FORDE.****THE END.**

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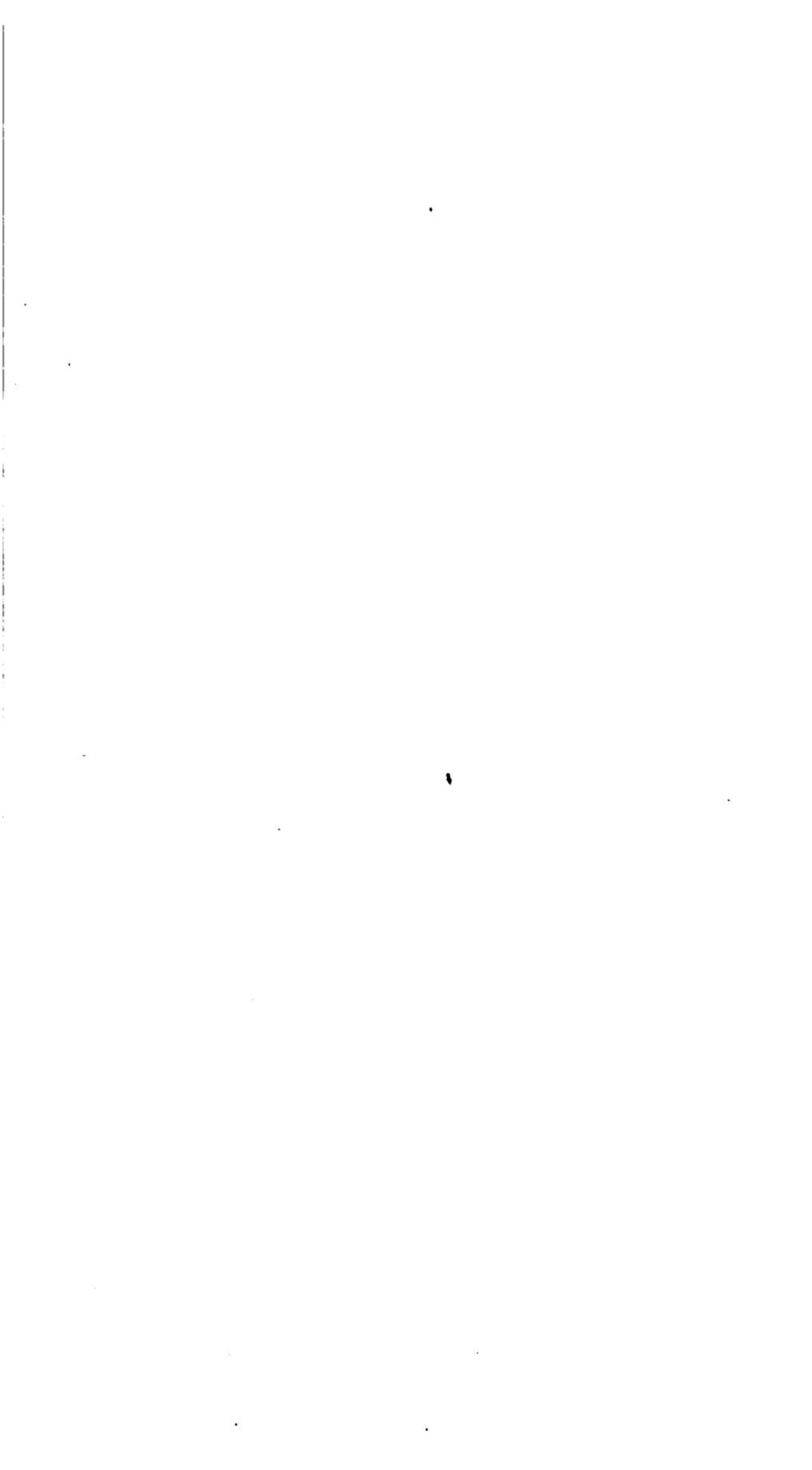
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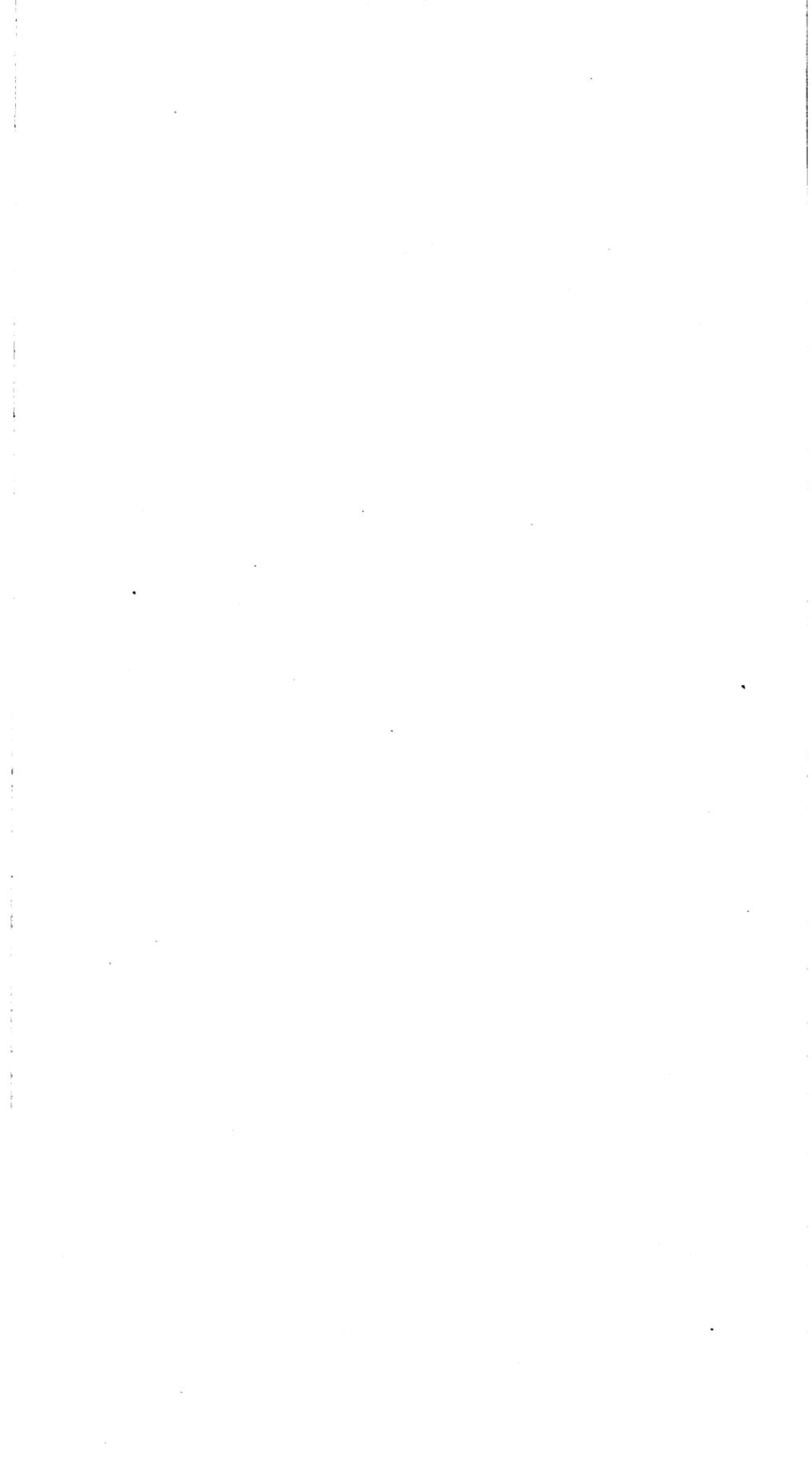
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